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Supreme Court, U.S.
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In The

Supreme Court of the United States

ARTHUR JACK ROSS and
BARBARA WHEELER ROSS,

Petitioners,

v.

BROADWAY TOWERS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Tennessee

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether federal law preempts a state statute when no conflict exists and when federal law specifically allows assertion of the type of remedies permitted by the state law?

2. Whether the standard for federal preemption law should be more stringent in an area of traditional state control?

LIST OF PARTIES

The caption of the case in this Court contains all names of all parties to the proceedings in the Supreme Court of Tennessee.

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PETITION FOR WRIT OF CERTIORARI

Arthur Jack Ross and Barbara Wheeler Ross, Petitioners herein, respectfully pray that a Writ of Certiorari issue to review of the opinion and judgment of the Supreme Court of Tennessee denying permission to appeal, entered in the above-styled case on June 25, 2007.

ORDERS ENTERED BY STATE COURTS

***Trial Courts*:** The judgment of the General Session Court of Knox County, Tennessee, entered on August 2, 2005, (unpublished) is attached as Appendix, pp. App. 37-44. The judgment entered after a trial de novo in the Knox County, Tennessee, Circuit Court on December 22, 2005 (unpublished) is attached as Appendix, pp. App. 23-24. ***Tennessee Court of Appeals*:** The opinion of the Tennessee Court of Appeals, Eastern Section at Knoxville,[1] entered on December 14, 2006, is attached as Appendix, pp. App. 1-21. ***Tennessee Supreme Court*:** The Tennessee Supreme Court denial of permission to appeal[2] by order entered on June 25, 2007, is attached as Appendix, p. App. 25.

STATEMENT OF JURISDICTION

The judgment of the Tennessee Court of Appeals was entered December 14, 2006. The Tennessee Supreme

[1] 228 S.W.3d 113 (Tenn.Ct.App.2006).

[2] *Ross v. Broadway Towers, Inc.*, No. E2006-00033-SC-R11-CV, 2007 Tenn. LEXIS 622 (June 25, 2007) (unpublished).

Court denied permission to appeal by order entered on June 25, 2007. This petition for a writ of certiorari was filed on September 24, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const. Art. VI, Cl. 2

7 U.S.C. § 1574

18 U.S.C. § 984(a)(1)(B)

28 U.S.C. § 1257

42 U.S.C.

- Section 1437d(1)(6)
- Section 1437f(d)(1)(b)
- Section 11901
- Section 12162(e)(2)(c)

24 C.F.R.

- Section 5.855
- Section 5.858
- Section 5.859
- Section 247.6
- Section 291.100(c)(1),(2),(3)

Tenn. Code Ann.

- Section 66-28-103 (2007)
- Section 66-28-508 (2007)

STATEMENT OF CASE

Petitioners seek review of a state court decision that the doctrine of preemption precludes application of the Tennessee Uniform Residential Landlord and Tenant Act

(URLTA) to landlords who receive rental subsidies from the U.S. Department of Housing and Urban Development (HUD). HUD regulations explicitly subject HUD-subsidized landlords to state law governing termination of a tenancy.

The Respondent, Broadway Towers (Landlord), has a contract with HUD to provide rental housing for the elderly and people with disabilities. Mr. Ross is elderly and has multiple health issues. He requires a live-in aide to care for his daily needs. When Mr. Ross sought housing from Landlord, Mr. Ross and his aide authorized Landlord to conduct a criminal history check. They both signed releases and gave Landlord copies of their social security cards and driver's licenses to assist Landlord in this investigation.

Thereafter, on November 2, 2004, Landlord and Mr. Ross signed a lease, which also authorized Mr. Ross' aide to occupy the unit. Over six months later, on April 28, 2005, Landlord discovered that Mr. Ross' aide had been convicted of forgery committed in June 2000, almost four years before Landlord and Mr. Ross executed the lease.

On May 9, 2005, Landlord notified Mr. Ross that his lease would terminate in 30 days because of his "repeated and serious 'Material Non-Compliance' with the lease agreement." Landlord identified Mr. Ross' non-compliance as "[y]our live-in aide/wife[3] has a felony conviction which prohibits her from residing at Broadway Towers Apartments due to our one-strike policy which you signed upon moving in to our facility."

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[3] Mr. Ross and his aide were married on May 5, 2005.

Landlord did not allege any fraud or misrepresentation in Petitioners' application for housing or in the information they provided to enable Landlord to conduct a prelease criminal-background investigation. Landlord did not allege that either Petitioner has ever committed a crime involving drugs or violence. Landlord did not allege that either Petitioner has ever committed any type of criminal activity on Landlord's premises or that any other residents, neighbors, employees, or law enforcement officials have made any complaint whatsoever about the conduct of either Petitioner. Consequently, Petitioners disputed Landlord's right to terminate Mr. Ross' lease.

Petitioners contended that Landlord could not terminate the lease, and Mr. Ross paid rent after receiving Landlord's termination notice. Landlord accepted this payment without reservation. Tennessee law provides that a landlord who "accepts rent without reservation and with knowledge of a tenant default . . . condones the default and thereby waives such landlord's right and is estopped from terminating the rental agreement as to that breach."[4]

Despite accepting rent, however, Landlord filed an eviction action on June 6, 2005, in the Knox County General Sessions Court to obtain possession of Petitioners' unit. After a hearing on August 7, 2005, that court granted Landlord possession. On August 12, 2005, Petitioners sought to retain possession by filing a petition in the Knox County Circuit Court for a Writ of Certiorari and Supercedeas. The Circuit Court granted the petition and conducted a trial de novo on January 3, 2006.

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[4] Tenn. Code Ann. § 66-28-508 (2007).

At trial, the Petitioners denied any default and maintained that even if the live-in aide wife's forgery conviction constituted a default, Landlord's acceptance of rent after the alleged default constituted a waiver of Landlord's right to terminate the lease. The Circuit Court rejected Petitioners' position and granted possession to Landlord, in part holding that Landlord had a duty under federal law to evict persons convicted of a felony:

> [The HUD] regulations which permit termination under these circumstances are for the benefit of all occupants of the subsidized housing project; and that the landlord has a duty to enforce those regulations and enforce those lease provisions for the benefit of other tenants; and that they are not entitled to waive the right of other tenants to insist upon the enforcement of those regulations.[5]

On January 3, 2006, Petitioners filed a Notice of Appeal to the Tennessee Court of Appeals, contending that the trial court misinterpreted HUD regulations.

On December 14, 2006, the Tennessee Court of Appeals affirmed the trial court's decision to evict Petitioners. In part, the Court of Appeals held that Tenn. Code Ann. section 66-28-508 if triggered would be preempted by federal law because it presents an obstacle to the objectives of Congress. Petitioners timely filed a Petition for Re-Hearing, which the Court of Appeals denied on January 5, 2007. Petitioners timely filed an Application for Permission to Appeal to the Tennessee Supreme Court, which was denied on June 25, 2007. The Tennessee Court of Appeals issued a mandate on July 10, 2007; it was recalled on

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[5] Knox County Circuit Court Order, App. 23-24.

August 14, 2007, to allow Petitioners to remain in possession pending final resolution orders of this Court. The petition for a writ of certiorari to this Honorable Court has been timely filed within 90 days of June 25, 2007, the denial of application to appeal to the Tennessee Supreme Court.

REASONS FOR GRANTING CERTIORARI

By the Tennessee Supreme Court's denial of Petitioners' Application for Permission to Appeal, that court let stand the Tennessee Court of Appeals' decision on an important federal question:

1) that conflicts with the decision of another state court of last resort,

2) that has not been, but should be, settled by this Court,

3) in a way that conflicts with relevant decisions of this Court, and

4) that erodes a state's ability to enforce its own laws.

This case concerns one of the most important and timely issues confronting housing law in America: whether a state has the ability to enforce its own laws within its sovereignty. This Court has repeatedly recognized a presumption against preemption of state laws,[6] especially

[6] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973); *Silver v. N.Y. Stock Exchange*, 373 U.S. 341, 357 (1963).

in housing cases.[7] In fact, HUD regulations explicitly subject HUD-subsidized landlords to state law governing termination of a tenancy.[8] By failing to apply the doctrine of preemption properly, the Tennessee court renders almost the entirety of Tennessee landlord-tenant law inapplicable to any federally subsidized tenancy.

State Court's Erroneous Rationale. The Tennessee court based its decision on *Scarborough v. Winn Residential L.L.P./Atlantic Terrace Apartments*,[9] in which the District of Columbia Court of Appeals held that federal law preempted a local ordinance because the ordinance, if enforced, would have effectively undermined the clear intent of the federal statute.

That federal statute required that leases for federally-subsidized rental housing include a provision permitting a landlord to evict tenants who are engaged in criminal activity threatening the health, safety, or right to peaceful enjoyment of other tenants.[10] The tenant in *Scarborough* had a loaded 12-gauge shotgun in her apartment one day after it had been used in a fatal shooting. When the landlord attempted to evict the tenant, she invoked a provision in the District of Columbia Code requiring landlords to give tenants 30 days in which to cure any default. The trial court found the tenant's position "absurd":

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[7] *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 718 (11th Cir. 1985), *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-204 (U.S.1983), *Lindsey v. Normet*, 405 U.S. 56, 68 (1972).

[8] 24 C.F.R. § 247.6(a),(c) (1984); 66 Fed. Reg. 28776 (May 24, 2001).

[9] 890 A.2d 249 (D.C.2006).

[10] 42 U.S.C. § 1437f(d)(1)(B)(iii).

> [W]hat would a tenant be required to do to cure? Simply commit no further crimes of the same sort? No further crimes of any sort? In this case, [the tenants] must press the strained claim that [a tenant] could cure by not assaulting other tenants for a month. Taken one step further, this reasoning means that a tenant who murdered another tenant could not be evicted as long as he refrained from killing anyone else – or perhaps from committing other crimes – for 30 days. This cannot be what the law is.[11]

No matter how absurd such an interpretation might be, however, the *Scarborough* court acknowledged that the ordinance was ambiguous, thereby precluding a finding that the tenant's interpretation was invalid as a matter of law. Since Congress generally cedes to state and local governments the right to define the terms of the landlord-tenant relationship, a literal reading of the statute would indeed preclude enforcement of the HUD regulation in the way it was intended. The doctrine of preemption allowed the court to avoid that result:

> [E]ven if D.C. law otherwise afforded [the tenant] an opportunity to correct the unlawful possession of a loaded shotgun, enforcing that requirement would frustrate the objectives of the federal program, and so must yield under principles of federal pre-emption – thus permitting her eviction on proper notice and the finding of the lease violation by the court.[12]

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[11] 890 A.2d 249, 254 (D.C.2006) (quoting the trial court's citation from *D.C. Hous. Auth. v. Cherry*, No. 03-LT-15931 (D.C.Super.Ct. Jan. 20, 2004)).

[12] *Id.* at 255.

Relying on *Scarborough*'s application of the doctrine of preemption, the Tennessee court reasoned that the Tennessee statute at issue would similarly thwart federal objectives:

> [A]pplication of that statute is preempted by the federal regulations because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[13] Specifically, we believe the federal public policy in providing subsidized housing that is safe and crime-free for all the tenants is paramount to any policy at issue in Tenn.Code Ann. § 66-28-508.[14]

In light of the court's conclusion that the federal public policy underlying the federal regulation is "paramount" to the policy underlying Tennessee law, it is necessary to examine the state statute, which is a provision of the Uniform Residential Landlord and Tenant Act (URLTA):

> If the landlord accepts rent without reservation and with knowledge of a tenant default, the landlord by such acceptance condones the default and thereby waives such landlord's right and is estopped from terminating the rental agreement as to that breach.[15]

This statute codifies a long-standing principle of common law.[16] In general, by accepting benefits under a contract with knowledge of a breach, the non-breaching party

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[13] 228 S.W.3d 113, 139 (Tenn.Ct.App.2006) (quoting *Boggs v. Boggs*, 520 U.S. 833, 844 (1997), *quoted in* 890 A.2d at 255)).

[14] *Id.*

[15] TENN. CODE ANN. § 66-28-508 (2007).

[16] *See generally, Warwick Hous. Auth. v. McLeod*, 913 A.2d 1033 (R.I.2007).

waives the breach.[17] Some jurisdictions have relaxed the common-law rule by considering either the landlord's intent[18] or the tenant's reliance.[19] Other jurisdictions[20] – including Tennessee – use an objective standard: As long as the landlord knows about the breach, the mere act of accepting rent constitutes, by operation of law, a waiver of the right to terminate the lease based on any breach occurring prior to accepting rent. In the words of one court,

> This rule is founded on principles of common honesty: a landlord cannot take the position [that] a lease is valid for one purpose, e.g., collection of rent, and yet declare it invalid for other purposes.[21]

When the Tennessee General Assembly enacted URLTA, it did not blindly adopt the waiver provision proposed by the National Conference on Commissioners on Uniform State Laws.[22] The legislature modified that section of the

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[17] *94th Aero Squadron of Memphis, Inc. v. Memphis-Shelby Co. Airport*, 169 S.W.3d 627, 635-363 (Tenn.Ct.App.2004) *citing* 17 Am.Jur.2d *Contracts* § 447 (1964).

[18] *See, e.g., Madison Ave. Leasehold, LLC v. Madison Bentley Assocs.*, 30 A.D.3d 1, 5 (N.Y.2006).

[19] *See, e.g., Easterling v. Peterson*, 753 P.2d 902, 903 (N.M.1988).

[20] *See, e.g., Atkin's Waste Materials, Inc. v. May*, 314 N.E.2d 871, 873 (N.Y.App.1974).

[21] *HK New Plan Marwood Sunshine Cheyenne, LLC. v. Onofrey Food Serv., Inc.*, 846 N.E.2d 318, 324 (Ind.App.2006).

[22] "Acceptance of rent with knowledge of a default by the tenant or acceptance of performance by him that varies from the term of the rental agreement constitutes a waiver of the landlord's right to terminate the rental agreement for that breach, unless otherwise agreed after the breach has occurred." URLTA § 4.204, Nat'l Conf. of Comm'rs of St. Laws (2006).

proposed Uniform Act, deliberately and explicitly codifying the common law and establishing a clear and unequivocal consequence for a landlord who accepts rent after declaring a breach.[23]

Under the URLTA, post-default acceptance of rent in Tennessee is discretionary.[24] The Tennessee Code is clear about the options a Landlord has when evicting a tenant: the landlord may either accept rent (1) with reservation, and the landlord can proceed to eviction, or (2) without reservation and waive its rights to proceed with eviction.

URLTA provides a landlord with a mechanism to accept rent with reservation allowing a Landlord to proceed with eviction.[25] Landlord in this case chose to take rent. The record clearly shows that Landlord had received Mrs. Ross' criminal history on April 29, 2005, as noted in the Tennessee Court of Appeal's decision.[26] Landlord had knowledge of the alleged default prior to accepting rent because Landlord sent the termination notice listing the reason for the termination on May 9, 2005.[27] Landlord took the rent on or around June 3, 2005, without reservation.[28] The inadvertence could only be due to the fact that Landlord knew about the alleged violations, but it took rent inadvertently with full knowledge of the violations.

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[23] See TENN. CODE ANN. § 66-28-508 (2007).

[24] *Id.*

[25] *Id.*

[26] *Ross v. Broadway Towers*, 228 S.W.3d 113, 116-117 (Tenn.Ct.App.2006).

[27] *Id.*

[28] *Id.*

Tennessee courts have held that acceptance of rent with knowledge of the default waives the right to evict. The Tennessee Court of Appeals' decision opens the door for public and subsidized housing tenants to have less state protections than other tenants in Tennessee, and it promotes erosion of state rights. The holding of the Tennessee Court of Appeals that Tenn. Code Ann. section 66-28-508 thwarts the objectives of Congress suggests that tenants in public or subsidized housing may not have the protections of URLTA, while others not residing in public or subsidized housing would have the benefit of the law. Essentially, the holding in this case means that whenever a landlord terminates the lease pursuant to federal regulations, any protections afforded by the state landlord-tenant law can be superseded even though there is no direct conflict with the federal regulations and there has been no finding of significant frustration to the objectives of Congress. This state's ability to enforce its own laws within its borders has been diminished.

Purposes of the State Law. The purposes of the Tennessee law are consistent with federal public housing policy and do not conflict with federal public housing policy. When deciding whether Tenn.Code Ann. section 66-28-508 stands as an obstacle to Congress' objectives, a court should consider the purposes of the state statute in question. The Tennessee Court of Appeal's decision did not address the purposes of the URLTA. Tenn. Code Ann. section 66-28-103 directs that:

> (a) This chapter shall be liberally construed and applied to promote its underlying purposes and policies.
>
> **(b) Underlying purposes and policies of this chapter are to:**

> **(1) Simplify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations of Landlord and tenant.**
>
> **(2) Encourage Landlord and tenant to maintain and improve the quality of housing.**
>
> **(3) Promote equal protection to all parties; and**
>
> **(4) Make uniform the law in Tennessee.**
>
> (c) Unless displaced by the provisions of this chapter, the principles of law and equity, including the law relating to capacity to contract, health, safety and fire prevention, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions.
>
> (d) This chapter being a general chapter intended as a unified coverage of its subject matter, no part of it is to be construed as impliedly repealed by subsequent legislation if that construction can reasonably be avoided.[29]

One of the purposes of URLTA is to encourage the landlord and tenant to improve the quality of housing. Similarly, Congress declared that "the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs."[30] URLTA is consistent with the

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[29] TENN. CODE ANN. § 66-28-103 (2007) (emphasis added).

[30] 42 U.S.C. § 11901(1).

objectives of Congress and does not thwart the purposes of Congress.

This Court has determined that if the purpose of the local act is consistent with federal law, no preemption will occur. This Court held that the federal Pregnancy Disability Act (PDA) does not preempt the California pregnancy disability leave statute.[31] The Court affirmed the lower court's conclusion, subject to some limitations, that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise."[32] The Court further reasoned that the PDA and California's pregnancy disability leave statute share a common goal – promoting equal employment opportunity.[33] Other courts have found that no preemption occurs when the purpose of the local law is consistent with the federal law. When the New Jersey Supreme Court found no preemption of a state law barring discrimination based on source of income for section 8 tenants, the court decided that the two statutes did not actually conflict, but that the state law in fact furthered the goals of the federal law.[34]

Petitioners turn to this Court for relief only because the state court refused to enforce the state statute, determining that federal law preempts it. Petitioners maintain that the state court's conclusion is erroneous because the

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[31] *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 290 (1987).

[32] *Id.* at 285 (quoting *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985)).

[33] *Id.* at 291.

[34] *Franklin Tower One, L.L.C. v. N.M.*, 157 N.J. 602 (N.J.1999).

doctrine of preemption does not operate to invalidate the Tennessee statute at issue. The purposes of URLTA are consistent with the objectives of Congress and do not conflict or provide an obstacle to the objectives of Congress.

Preemption Law Favors Reconciling Both Federal and State Law. Our federal system of government recognizes the dual sovereignty of the federal government and the various state governments.[35] The states possess sovereignty within their particular spheres concurrent with the federal government subject only to the power of Congress under the Supremacy Clause of the United States Constitution[36] to preempt state law.[37]

Preemption of state laws by federal statutes "is not to be lightly presumed."[38] This presumption against preemption of local law applies with special force in a "field which the States have traditionally occupied."[39] Accordingly, the courts work from the assumption that the historic powers of the states, with regard to matters traditionally subject

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[35] *Printz v. United States*, 521 U.S. 898, 918 (1997); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

[36] U.S. Const. Art. VI, cl. 2.

[37] *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *BellSouth Telecomm., Inc. v. Greer*, 972 S.W.2d 663, 670 (Tenn. Ct. App.1997).

[38] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

[39] *Id.* at 485. *See Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./Rhode Island, Inc.*, 507 U.S. 218, 224 (1993); *BellSouth Telecomm., Inc. v. Greer*, 972 S.W.2d 663, 670 (Tenn.Ct.App.1997).

to state regulation, are not displaced by a federal statute unless that is the "clear and manifest" intent of Congress.[40]

Courts have found the requisite preemptive purpose in three circumstances, although the categories are not "rigidly distinct":[41] (1) when Congress includes explicit preemptive language in a federal statute ("express preemption"), (2) when federal statutes occupy the entire legislative field, leaving no room for state regulation, and (3) when there is an actual conflict between federal and state law.[42]

Any preemption inquiry must begin with the text of the federal statute,[43] but, the text is not written in a vacuum. Accordingly, the courts must also consider the structure and purpose of the entire federal statutory scheme,[44] and federal law should displace state only to the extent that federal law expressly or impliedly preempts

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[40] *General Motors Corp. v. Abrams*, 897 F.2d 34 (2d Cir. 1990); *see, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41 (2001); *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001); *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 325 (1997); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Riggs v. Burson*, 941 S.W.2d 44, 48 (Tenn.1997); *Grace Thru Faith v. Caldwell*, 944 S.W.2d 607, 609 (Tenn.Ct.App.1996).

[41] *English v. General Elec. Co.*, 496 U.S. 72, 79 n. 5 (1990).

[42] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540 (2001); *Gade v. National Solid Wastes Mgt. Ass'n*, 505 U.S. 88, 98 (1992); *LeTellier v. LeTellier*, 40 S.W.3d 490, 497 (Tenn.2001); *Profill Dev., Inc. v. Dills*, 960 S.W.2d 17, 27 (Tenn.App.1997).

[43] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996).

[44] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Barnett Bank of Marion Co., N.A. v. Nelson*, 517 U.S. 25, 31 (1996); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990).

state law.[45] Therefore, courts try to reconcile federal and state laws[46] rather than seek out conflict where none clearly exists.[47]

In the instant case, the Tennessee court did not find that a federal statute expressly preempted Tennessee law. Likewise, the court did not expressly hold that federal law leaves no room for any state regulation of the landlord-tenant relationship. Rather, the court applied an inappropriate preemption standard, and created a conflict between a federal law and a provision of URLTA as adopted in Tennessee when no conflict exists.

Housing Law Is Traditionally Governed by State and Local Law. The field of housing regulation has been traditionally occupied by state and local law.[48]

> Housing is an area where Congress intended . . . two complementary systems of regulations to supplement each other with local law providing the general background law and federal law intervening only where federal involvement is deemed necessary.[49]

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[45] *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996); *BellSouth Telecomm., Inc. v. Greer*, 972 S.W.2d 663, 671 (Tenn.Ct.App.1997).

[46] *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 182-83 (1978); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973).

[47] *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 130 (1978).

[48] *Pennell v. City of San Jose*, 485 U.S. 1, 12 (1988) (regulating rents within local police powers); *Independence Park Apts. v. U.S.*, 449 F.3d 1235, 1243 (D.C.Cir.2006); *TOPA Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065, 1071 (9th Cir. 2003).

[49] *Rowe v. Pierce*, 622 F.Supp. 1030, 1033 (D.C.D.C.1985); *see, e.g. DeOliveira v. Illescas*, No. CV010811770, 2005 Conn. Super. LEXIS 1235 (Conn. Super. Ct. Apr. 10, 2005).

Therefore, federal housing programs are built upon the framework of state landlord-tenant law, and do not displace it.[50] There is no "scheme of federal regulation that is so pervasive as to make reasonable the inference that Congress left no room [for the states] to supplement it."[51]

Both Congress and HUD have recognized that federal public housing is subject to overlapping regulation by both the federal government and state governments;[52] and this Court has recognized that state and local housing law is not wholly preempted by federal law.[53]

Clearly, the Tennessee court's holding contradicts the preemption analysis used by other state and federal courts, which have held that federally subsidized landlords must follow the state's law governing eviction unless there

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[50] *Kargman v. Sullivan*, 552 F.2d 2, 11 (1st Cir. 1977) ("The federal legislation creating the network of subsidized housing laws is superimposed upon and consciously interdependent with the substructure of local law relating to housing . . . [a]nd . . . the local law here advances significant and uniquely local interests with which the courts should not lightly interfere."); *Rowe*, 622 F.Supp. at 1033; *Hous. Auth. of Everett v. Terry*, 114 Wash.2d 558 (1990) (enbanc) (holding that federal regulations creating administrative grievance procedure do not preempt state statutory requirements for opportunity to cure lease default).

[51] *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (U.S.1983).

[52] *See Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 718 (11th Cir. 1985) ("because agencies normally address problems in a detailed manner and can speak through a variety of means, . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive.").

[53] *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Lindsey v. Normet*, 405 U.S. 56 (1972).

is a direct and explicit contradiction with a federal mandate.[54]

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[54] *Comm'n on Human Rights & Opportunities v. Sullivan Assocs.*, 739 A.2d 238 (Conn.1999) (federal Section 8 statute does not preempt state statute prohibiting discrimination against prospective tenants on basis of lawful source of income); *Franklin Tower One, L.L.C. v. N.M.*, 157 N.J. 602, (N.J.1999) (federal Section 8 statutes do not preempt a state statute prohibiting discrimination against prospective tenants; because HUD explicitly preempted state laws elsewhere, it could have done so in regulation at issue); *Fairview Co. v. Idowu*, 148 Misc. 2d 17 (N.Y.Misc.1990) (termination notice for federally subsidized unit must meet state and local requirements as well as federal); *Woodrose Ltd. Belmont Dev. Co. v. Debolt*, No. CA-403, 1991 WL 115990 (Ohio App. June 20, 1991) (landlord in federal program must give tenant 30 days' notice required by state law, even though lease required only 10 days' notice); *Cuyahoga Metro. Hous. Auth. v. Harris*, 861 N.E.2d 179 (OhioMun.2006) (state's innocent-tenant defense is not preempted by federal law); *Hous. Auth. of the City of Everett v. Terry*, 114 Wash.2d 558, 560 (1990) (despite argument that state's requirement that tenants have ten days to cure a breach is preempted by congressional intent to achieve prompt eviction of tenants who pose or present a threat to neighbors, housing authority failed to overcome the "strong presumption against finding congressional intent to preempt"; further held that there is no conflict between the state and federal notice provisions); *see, e.g., Kenneth Arms Tenant Ass'n v. Martinez*, No. Civ. S-01-832 LKK/JFM, 2001 U.S. Dist. LEXIS 11470 (July 3, 2001) (state preservation notice law neither expressly nor impliedly preempted and states may impose greater procedural restrictions than those imposed by federal law); *New Bedford Hous. Auth. v. Olan*, 736 N.E.2d 410 (Mass.App.Ct.2000) (finding that state public housing eviction notice provisions did not conflict with federal law and thus were not preempted); *Southridge Coop. Section No. 3, Inc. v. Menendez*, 535 N.Y.S.2d 299 (N.Y.Civ.Ct.1998) (finding state law nullifying an occupancy agreement restricting occupancy in a Section 213 cooperative as valid because there is no collision between federal and state law with regard to that type of agreement); *Cleveland v. Berger*, 631 N.E.2d 1085 (1993), *appeal denied*, 627 N.E.2d 1002, *cert. denied*, 115 S.Ct. 68 (1994) and *Berger v. City of Cleveland*, 110 F.3d 63 (6th Cir. 1997) (finding no preemption of City's code standards and penalties as applied to Section 8 property); *see also, TOPA Equities, Ltd. v. City of LA*, 342 F.3d 1065 (9th Cir. 2003) (the court found that federal law governing prepayments

(Continued on following page)

> [T]he mere potential for conflict . . . is not enough to justify a court in concluding that federal power precludes an otherwise valid exercise of state sovereignty. On the contrary, we think that an assertion of preemption directed to such a purely local situation must be accompanied by *pleading and proof of actual, significant frustration of federal purpose.*"[55]

These courts have often recognized that rather than frustrating federal objectives, state laws that offer additional protections to tenants actually advance the goals of federal housing programs by increasing the availability of low-income housing.[56]

When courts have found that federal law preempted state law, it was because they found it impossible to reconcile the commands of federal law with the state

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did not preempt local base rent-setting provisions); *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045 (D.C.Cir.1971) (holding that legal title to public housing projects, which were operated by the National Housing Authority did not preclude suit under the doctrine of sovereign immunity [the opinion did not speak to the preemption issue.]); *Estevez v. Cosmopolitan Assocs. LLC*, 2005 WL 3164146 (E.D.N.Y. Nov. 28, 2005) (owner must continue to accept EVs, and tenants have private right of action to enforce federal statute); *Jeanty v. Shore Terrace Realty*, No. 03-Cv. 8669 (BSJ), 2004 WL 1794496 (S.D.N.Y. Aug. 10, 2004) (enjoining owner from refusing to accept enhanced voucher); *New Bedford Hous. Auth.*, 50 Mass. App. Ct. 188, 205 (2000) (Commonwealth's statute required tenant have opportunity to engage counsel and prepare for eviction hearing not preempted by less stringent federal statute); *Rosario v. Diagonal Realty LLC*, 8 N.Y.3d 755 (2007) (local law's requirement that owner renew lease with voucher assistance not preempted by federal law).

[55] *Kargman v. Sullivan*, 552 F.2d 2, 13 (1st Cir. 1977) (emphasis added).

[56] *See, e.g., Franklin Tower One, L.L.C. v. New Mexico*, 157 N.J. 602 (N.J.1999).

requirements.[57] For example, in *Boston Hous. Auth. v. Garcia*,[58] the Massachusetts Supreme Court held that federal law preempted a Massachusetts statute that allowed a tenant to defeat an eviction prompted by the acts of a household member if the tenant could not have foreseen or prevented the misconduct. Since federal law explicitly precludes the "innocent tenant" defense,[59] it was impossible to reconcile federal law and state law.

Federal housing law may also preempt a state law that attempts to interfere with Congressional delegation of authority to HUD. For example, in *Booker v. Edwards*[60], a local ordinance gave tenants a right of first refusal, which

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[57] *See, e.g., Forest Park v. Hadley*, 336 F.3d 724 (8th Cir. 2003) (finding both express and implied preemption based on both an express provision in LIHPRA preempting state laws that restrict or inhibit the prepayment of mortgages and on conflict preemption principles); *Cienega Gardens v. United States*, 38 Fed. Cl. 64 (1997) (local rent control law is preempted in its applicability to owners that have prepaid their subsidized mortgages), *vacated on other grounds*, 194 F.3d 1231 (Fed.Cir.1998); *Hous. Auth. of Fort Collins v. United States*, 980 F.2d 624 (10th Cir. 1992) (state law releasing federal liens preempted by federal statutory provisions extending PHA's non-financial obligations upon debt forgiveness); *Ayers v. Philadelphia*, 908 F.2d 1184 (3d Cir. 1990) (Pennsylvania law regarding foreclosure of mortgages was preempted by HUD's Turnkey III regulations); *Housing Auth. & Urban Redevel. Agency of Atlantic City v. Taylor*, 796 A.2d 193 (N.J.2002) (federal statutory and regulatory definitions of and limitations on rent preempt state law permitting recovery of other charges as "additional rent" in summary proceeding); *City of South San Francisco Hous. Auth. v. Guillory*, 41 Cal.App.4th Supp. 13 (1995) (finding that federal law preempted state law to the extent that state law could be interpreted as providing a reasonable cause standard for evictions).

[58] *Boston Hous. Auth. v. Garcia*, 449 Mass. 727 (Mass.2007).

[59] *Dept. of Hous. v. Rucker*, 535 U.S. 125 (2002).

[60] 99 F.3d 1165, 1169 (D.C.Cir.1996). *See also City of Country Club Hills v. HUD*, No. 99-C-7139, 2001 WL 1117276 (N.D.Ill. Sept. 17, 2001); *United States v. City of St. Paul*, 258 F.3d 750 (8th Cir. 2001).

the plaintiff asserted in a post-foreclosure eviction. The District of Columbia Circuit Court of Appeals examined HUD's Property Division Handbook, which interpreted HUD regulations, and found a clear intent to preclude "former mortgagors" from being offered a right of first refusal. Since Congress gave HUD broad authority to manage properties acquired through the operations of its various mortgage programs, the federal statute could not be reconciled with a conflicted local ordinance. The *Booker* court conceded, however, that in the absence of federal regulation, even where federal property issues are involved, courts must follow local law unless there is a *clear* need for a federal common law rule.[61] Thus, inevitably there will be situations where the use of HUD's discretion is at issue (because federal property is involved) and state law is not preempted.[62]

There has been no attempt by Congress to preempt state law regarding eviction proceedings. Congress has demonstrated intent to preempt state law in other areas.[63] Where this occurs, there is a presumption that other provisions of the law are to be read consistently with, and not preempt, state law.[64]

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[61] *Booker*, 99 F.3d 1165, 1169 (D.C.Cir.1996) (emphasis added).

[62] *See, e.g., Merrill Tenant Council v. HUD*, 638 F.2d 1086 (7th Cir. 1981) (HUD and management of HUD properties are required to pay interest on security deposits under Illinois State law).

[63] Pub. L. No. 101-625, Title V, § 503(b), 104 Stat. 4181 (Nov. 28, 1990), now found at 42 U.S.C. § 1437d(1)(7).

[64] *Cipollone v. Liggett Group*, 505 U.S. 504, 517 (1992). *See also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 550 (2001) ("an express definition of the preemptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to preempt other matters," quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995)).

Regarding evictions, however, HUD regulations explicitly state that they are not intended to preempt state and local law but are intended to complement those laws. For example, in the final rule regarding the "Screening and Eviction for Drug Abuse and Other Criminal Activity," HUD explicitly stated that the rule does not preempt state law.[65]

Similarly, HUD has consistently required landlords to comply with both state and local law, as well as federal regulations. The HUD regulations governing eviction state that "[t]he landlord shall not evict any tenant except by judicial action pursuant to State or local law and in accordance with the requirements of this subpart."[66] Moreover, HUD's policy is to provide tenants with a minimal level of protection, but state and local governments may impose additional protections:

> A tenant may rely on State or local law governing eviction procedures where such law provides the tenant procedural rights which are in addition to those provided by this subpart, except where such State or local law has been preempted under Part 246 [dealing with rents charged under State and local rent-control statutes] of this chapter or by other action of the United States.[67]

Additionally, federal regulations concerning criminal activity do not mandate that an owner evict for criminal activity. Rather, the federal regulations provide that "[t]he lease *must* provide that the owner may terminate tenancy

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[65] 66 Fed. Reg. 28776 (May 24, 2001).

[66] 24 C.F.R. § 247.6(a) (1984).

[67] 24 C.F.R. § 247.6(c) (1984).

for . . . [a]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents."[68] Clearly, the regulations could have covered how a landlord should evict a tenant, but they do not. Instead, the regulations cover what must be contained in the lease.

Similarly, the federal law on which the Tennessee court relied[69] does not mandate that a landlord evict a tenant for criminal activity. The statute simply mandates that a public housing authority utilize leases that contain specific information relating to criminal activity.[70] The statute does not – as the Tennessee court held – require landlords to evict all tenants who have committed a crime. Rather, the statute gives landlords the discretion to evict, as this Honorable Court pointed out in *Department of Housing v. Rucker.* In *Rucker*, this Court held that federal housing law,[71] "unambiguously" requires lease terms "that vest local public housing authorities with the ***discretion*** to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity."[72] However, *Rucker* does not mandate that all tenants with criminal histories be evicted.[73] In *Rucker*, this Court was clear that a landlord had discretion when choosing to evict a tenant.[74]

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[68] 24 C.F.R. §§ 5.858 and 5.859(a).

[69] 42 U.S.C. § 1437d(l)(6) (2000).

[70] *Id.*

[71] *Id.*

[72] *Dept. of Hous. v. Rucker*, 535 U.S. 125, 130 (2002) (emphasis added).

[73] *Id.*

[74] *Id.*

Further, *Rucker* does not mandate that the tenant lose all defenses provided by state law.[75] Thus, the impact of *Rucker* on public housing authorities and landlord's discretion is limited.[76] State legislatures are free to enact legislation so long as the legislation does not conflict with the housing authorities' discretion.

Tenn. Code Ann. section 66-28-508 does not conflict with a landlord's discretion to evict. In fact, it explicitly provides the landlord with discretion to continue the eviction process by taking the rent with reservation. A mandatory right to cure or innocent tenant defense is distinctly different from a discretionary action by a landlord to accept rent without reservation. Under the URLTA, the landlord maintains discretion to evict. Tenn.Code Ann. Section 66-28-508 does not frustrate the purposes of Congress; it complements federal law.

CONCLUSION

Broadway Towers, Inc. gave a notice of termination of tenancy to Mr. Ross for a non-violent criminal conviction of his live-in aide/wife, Mrs. Ross. This conviction occurred prior to the lease, and then the complex accepted rent without reservation from Mr. Ross. Landlord now asks that the judicial system evict and uphold the eviction of Mr. Ross when it has not followed federal laws on evictions and has waived its right to proceed on an eviction according to state law. The Landlord suggests that the Court should still enforce the eviction because Landlord's

[75] *Id.*

[76] *Id.*

acceptance of rent was inadvertent. However, the record demonstrates that Landlord had full knowledge of the alleged breach at the time it accepted rent. To uphold the eviction, the Tennessee Court of Appeals had to preempt state law, misconstrue federal law and regulations and waive the terms of the lease without legal authority.

Preemption law favors reconciliation of both federal and state law. There is a strong presumption against preemption, and a court, when preempting state law, should make specific findings that rebut the presumption against preemption. In order to preempt state law, the Tennessee Court of Appeals relied upon a D.C. Circuit case dealing with a right to cure issue to preempt Tennessee law. A mandatory right to cure law is distinctly different from a state law giving the landlord discretion to evict when accepting rent. Further, the Tennessee Court of Appeals did not make any specific findings regarding preemption except that federal public policy is paramount. Applying a more stringent standard to preempt state law, as the Tennessee Court of Appeals did, in an area traditionally governed by state law is not proper and paves the way for numerous abuses of state and local housing law to occur. In this case, both federal law and state law could be followed without any direct conflict.

Landlord did not have to accept the rent. Because Landlord chose to take rent without reservation, Landlord must be bound by the law. Tenants do not have the privilege of being able to ignore federal or state law, and landlords should be bound as well. Further, such an approach is not consistent with HUD's declaration of no preemptive intent, nor with the general HUD regulation authorizing public housing tenants to assert any available state law defense. There are numerous other cases

upholding a state's ability to make and enforce laws concerning eviction within its borders. The Tennessee Court of Appeals' ruling on preemption unequivocally erodes a state's ability to enforce its own laws. The decision of the Tennessee Court of Appeals also allows an elderly man with multiple health issues to be evicted without proper legal authority. The only lawful result is that the Tennessee Court of Appeals decision be reversed.

Respectfully submitted,

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ARTHUR JACK ROSS, ET AL.
v.
BROADWAY TOWERS, INC.

No. E2006-00033-COA-R3-CV

COURT OF APPEALS OF TENNESSEE, AT KNOXVILLE

228 S.W.3d 113; 2006 Tenn. App. LEXIS 788

November 7, 2006, Session
December 14, 2006, Filed

COUNSEL: Kendra J. Mansur, Knoxville, Tennessee, for the Appellants, Arthur Jack Ross and Barbara Wheeler Ross.

Donald K. Vowell, Knoxville, Tennessee, for the Appellee Broadway Towers, Inc.

JUDGES: D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

OPINION BY: D. MICHAEL SWINEY

OPINION

Broadway Towers, Inc. ("Broadway Towers") provides federally subsidized housing for the elderly and disabled. Applicable federal regulations permit Broadway Towers to conduct criminal background checks on applicants and their family members or caretakers who will be residing with the applicant at the facility. Mr. Jack Ross applied for residency at Broadway Towers and also sought permission for his live-in aid, Ms. Barbara Wheeler, to reside on the premises with him. Ms. Wheeler signed an authorization for Broadway Towers to conduct a criminal background

check using the name "Barbara M. Wheeler." Both Mr. Ross and Ms. Wheeler were approved to live on the premises. Broadway Towers later discovered that Ms. Wheeler had a felony forgery conviction under the name "Barbara M. Norwood." The felony forgery conviction resulted from Ms. Wheeler's attempt to obtain money illegally from her elderly mother's bank account by using forged legal documents. Upon learning of Ms. Wheeler's felony forgery conviction, Broadway Towers served a notice of noncompliance on Mr. Ross requiring him and Ms. Wheeler to vacate the premises. When Mr. Ross and Ms. Wheeler refused to vacate the premises, this lawsuit was filed. The Trial Court ordered Mr. Ross and Ms. Wheeler to vacate the premises. We affirm.

OPINION

Background

Pursuant to a contract with the federal Department of Housing and Urban Development ("HUD") and in accordance with Section 202 of the federal Housing Act of 1959, as amended, Broadway Towers provides subsidized housing to the elderly and disabled. Mr. Jack Ross is currently eighty-five years old, and for several years has had numerous health issues which require a live-in aid to help care for his daily needs. In November of 2004, Mr. Ross and Broadway Towers entered into a document titled "202 ELDERLY/HANDICAPPED LEASE" (the "Lease"). Pursuant to the Lease, Mr. Ross' monthly rent payment totaled $475, with Mr. Ross paying $259 and HUD paying the remaining $216. The Lease provided that pursuant to HUD regulations, Broadway Towers could terminate the Lease "based upon either material noncompliance with this Agreement, material failure to carry out obligations

under any State landlord or tenant act, or other good cause." After setting forth the procedure to be utilized in the event of termination by either party, the Lease goes on to provide that Broadway Towers could terminate the lease for eight specific reasons. The provision pertinent to this appeal provides that the Lease can be terminated for:

> (4) Criminal activity by a tenant, any member of the tenant's household, a guest or another person under the tenant's control:
>
> > (a) That threatens the health, [sic] safety, or right to peaceful enjoyment of the premises by other residents (including property management staff residing on the premises); or
> >
> > (b) That threatens the heath [sic], safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises.

In addition to the contents of the Lease, Mr. Ross acknowledged that he received and was explained the contents of a document which set forth the rules and regulations of the property. Among other things, this document provides that:

> A resident will be held directly responsible for the actions of their household members, family members, caretakers/attendants, guest and/or visitors. . . . Resident acknowledges and agrees to inform and explain all Rules and Regulations to family members, caretakers/attendants, guest and/or visitors.

When he entered into the Lease, Mr. Ross was being provided living assistance by Ms. Barbara Wheeler, who is currently sixty-one (61) years old. Mr. Ross sought approval

from Broadway Towers for Ms. Wheeler to continue to provide this assistance and live on the premises with Mr. Ross. Ms. Wheeler signed an authorization for Broadway Towers to conduct a criminal records background check. Ms. Wheeler signed her full name as: Barbara (Bobbie) Maurine Wheeler. A criminal records check was conducted using the name "Barbara M. Wheeler" which showed no felony convictions or other criminal activity under that name.

The manager of Broadway Towers, Ms. Barbara Everence, described the following event which happened approximately five and one-half months after Mr. Ross and Ms. Wheeler moved into Broadway Towers:

> Mr. Ross appeared to be confused when he was in the common areas of the apartment complex. Several different residents made a comment of that, that Mrs. Wheeler was in jail and wasn't taking care of him.

Broadway Towers then contacted the Sheriff's Department and learned that Ms. Wheeler indeed was in jail. Upon further inquiry, Broadway Towers learned that Ms. Wheeler had a criminal record under the name "Barbara Norwood." Among other things, Ms. Wheeler had pled guilty to a Class E felony after she forged a document in an attempt to withdraw money from her elderly mother's bank account. Ms. Wheeler's illegal attempt to withdraw money from her mother's bank account took place on June 30, 2000, and the Affidavit of Complaint provided by Ms. Wheeler's mother provides as follows:

> The Defendant committed the offense of Forgery . . . on or about Friday June 30, 2000. The above named Defendant did attempt to obtain cash by means of transferring a forged document

> in the form of a Power of Attorney. The amount in the account was $30,000. The Defendant attempted to withdraw money from her mother's account by presenting a forged power of attorney where she had forged her mother's signature. The Defendant then filled out a Joint Survivorship Agreement and also forged the Affiant's name to it. The Defendant then tried to remove her mother's money from her account. This did happen at . . . [the] Rohm-Haas Credit Union in Knoxville. . . . The witness . . . knew Defendant and called Affiant to check on Power of Attorney and was informed by Affiant that she did not sign Power of Attorney and did not give permission for Defendant to get money from her acct.

Ms. Wheeler was indicted on four felony counts of forgery. On February 9, 2004, Ms. Wheeler pled guilty to one Class E felony count of forgery. Ms. Wheeler was sentenced to two years in the Tennessee Department of Corrections. However, it was agreed that Ms. Wheeler's two year sentence would be suspended upon her payment of court costs and her being placed on probation until January 23, 2011. Ms. Wheeler was declared "infamous" and ordered to provide a biological sample for DNA analysis.

Broadway Towers obtained an accurate copy of Ms. Wheeler's criminal history on April 28, 2005.

Mr. Ross and Ms. Wheeler were married on May 5, 2005.[1]

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[1] For the sake of consistency, we will continue to refer to Mr. Ross' now wife as Ms. Wheeler, as opposed to Mrs. Ross.

Upon learning of Ms. Wheeler's criminal background, Broadway Towers issued Mr. Ross a thirty day notice of material noncompliance (the "Notice"). Mr. Ross was informed that his lease would be terminated effective June 9, 2005, for a material non-compliance with the Lease. The Notice provided that the Lease was being terminated because of "[c]riminal activity by a tenant, any member of the tenant's household, a guest or another person under the tenant's control." The Notice also referenced the rules and regulations which provided that a "resident will be held directly responsible for the actions of their household members, family members, caretakers/attendants, guests and/or visitors." The Notice also stated:

> You are hereby notified that you are now in default of your lease due to the following actions(s):
>
> > Your live-in aide/wife has a felony conviction which prohibits her from residing at Broadway Towers Apartments due to our one-strike policy which you signed upon moving in to our facility.

Although Mr. Ross was informed that his lease would terminate on June 9, 2005, he submitted a rent payment on June 3, 2005. As Mr. Ross explained, "I just put it in the slot and they took it." After Mr. Ross and Ms. Wheeler refused to vacate the premises, Broadway Towers filed a detainer warrant in the Knox County General Sessions Court. The Sessions Court entered a judgment for possession in favor of Broadway Towers. Mr. Ross then filed a Petition for Writ of Certiorari and Supersedeas in the Circuit Court. Following a trial, the Circuit Court issued a Memorandum Opinion stating, in relevant part, as follows:

In this case, very briefly, it appears that Mr. Ross applied for an apartment at Broadway Towers . . . and ultimately learned on or about November the 2nd, 2004 that an apartment was available. And as a consequence, a lease was made with Mr. Ross for the use and possession of the apartment premises at Broadway Towers.

At that time, Mr. Ross certified with the appropriate medical evidence that he had the need of a live-in aid and requested then Barbara Wheeler, or Barbara Wheeler Norwood as the case may be, be permitted to live with him as his live-in aid, and that request was granted. At or about that time, Broadway Towers, following its regular practice, attempted to secure information about any criminal history that Barbara Wheeler might then have. There was considerable delay in obtaining information about Ms. Wheeler's criminal history.

But ultimately, on or about April 28th, 2005, Broadway Towers received information from the Criminal Court Clerk's office of this county indicating that Ms. Wheeler had what one might consider, a rather considerable criminal history or criminal record. The records furnished to Broadway Towers indicated that she had been convicted of disorderly conduct on November 21st of 2000 and that she had been charged on or about November the 16th, 2004 with two counts of assault, which had been bound over to the grand jury and which cases apparently are still pending.

Moreover, those records indicated that on February the 9th, 2004, she [was] convicted by the Criminal Court of this county for forgery. The underlying records indicated that she had apparently attempted to obtain $30,000 or thereabouts

from a credit union that belonged to her mother, and her attempt to secure those funds was by the device of forgery.

The records further indicated that on March the 11th, 2005, the probation that had been granted to her in connection with her conviction of forgery was revoked. And so as a result of this history, and in its attempt to screen applicants as it is entitled to do for occupancy at Broadway Towers, the Broadway Towers became somewhat concerned. And on May the 9th of 2005, Broadway Towers issued a notice to Mr. Ross that because of the forgery conviction, a felony of Mrs. Wheeler, he would be required to terminate his lease arrangement with that apartment complex on June the 9th of 2005. . . .

The notice that Broadway Towers gave to Mr. Ross to terminate his tenancy referred to only one part of Mrs. Ross' criminal history. It stated that Mr. Ross was notified that he was in default under his lease, due to "your live in maid/wife has a felony conviction which prohibits her from residing at Broadway Towers due to our one strike policy which you signed upon moving in to our facility."

The defendants have taken issue with the adequacy of that notice. And certainly a question is raised about whether the Broadway Towers Incorporated is entitled to rely on other parts of the criminal history of Mrs. Ross when that criminal history was not specified in the notice given to Mr. Ross to terminate.

However, the Court notes that under the regulations that apply to these subsidized housing cases the landlord is only required to state

the reasons for termination with "enough specificity so as to enable the tenant to prepare a defense [to] the grounds for termination." And in any event, it would appear that the defendants were clearly advised that Broadway Towers was at least concerned in this case about Mrs. Ross' conviction for forgery.

It appears to the Court and the Court finds in these cases that operators of subsidized housing projects of this kind in this case are entitled to screen applicants, and as a matter of fact, they are required to place in their lease terms and certain provisions that enable the owner or manager of the subsidized housing property to terminate lease agreements with tenants that have been engaged in criminal activity that would threaten the safety or health of other tenants, or the peaceful enjoyment of the premises by other tenants. And it would appear in this case that most probably, if Mrs. Ross had disclosed the fact that she had gone by the name of Norwood, that her criminal record would have been made evident to Broadway Towers earlier and she would not have been permitted to occupy the premises in the first place. . . .

[T]he Plaintiff, Broadway Towers, is entitled to screen applicants. And so the character of the people that they admit for occupancy is a pertinent consideration under the federal regulations that apply to these kinds of cases. There's no question that Mrs. Ross was guilty of the offense of forgery, and there's no question that her probation was revoked by the Court with respect to that conviction on March the 11th, 2005.

The Court perhaps should add that the federal regulations provide that these agreements in

these cases must also contain a provision that the lease can be terminated if a tenant or others affected by the lease have had probation revoked or are fleeing in an attempt to avoid sanctions of the criminal court.

So there are ample grounds here to terminate this lease. And it would appear to the Court that it is a fair inference that Mrs. Ross' conviction and her criminal history threatened the safety or health or peaceful enjoyment of the premises by other tenants in the sense that these elderly people living there would no doubt be concerned if they learned that someone occupying the premises with them had been guilty of this kind of theft crime. And I submit that it would not make any difference to those tenants whether that crime occurred during the lease or before the lease. . . .

In any event, I find in this case that Broadway Towers, Incorporated has established that they had a right to terminate the lease, and that the notice was appropriate. And in this case, I find that the regulations which permit termination under these circumstances are for the benefit of all occupants of the subsidized housing project; and that the landlord has a duty to enforce those regulations and enforce those lease provisions for the benefit of other tenants; and that they are not entitled to waive the right of other tenants to insist upon the enforcement of those regulations. And hence, I conclude that the acceptance of rent for the month of June 2005 allegedly, inadvertently, by Broadway Towers in this case was not a waiver as contemplated by the Tennessee Residential Landlord and Tenant Act.

The Trial Court then entered a final judgment giving Mr. Ross and Ms. Wheeler until January 1, 2006 in which to vacate the premises. It was also ordered that Mr. Ross was to pay rent through that date.

Mr. Ross appeals, raising the following issues, which we quote:

> I. Whether the Trial Court erred in granting the detainer warrant when federal regulations require Broadway Towers to evict only for the reasons listed on the termination notice, and the act of forgery committed by Mrs. Wheeler Ross more than five years ago does not constitute criminal activity for which the complex can evict.
>
> II. Whether the Trial Court erred in granting the detainer warrant when Broadway Towers had signed a lease with Mr. Ross, and there were no allegations in the lease termination notice of any breaches of the lease by either Mr. Ross or Mrs. Wheeler Ross that occurred during the lease term.
>
> III. Whether the Trial Court erred in granting the detainer warrant when Broadway Towers accepted rent without reservation in June 2005, after giving Mr. Ross a lease termination notice on May 9, 2005.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan,* 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of

review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

In many respects, the relevant portions of the lease mirror the pertinent federal regulations. For example, the federal regulations provide that a lease "must" provide for termination of the lease for the following:

> (1) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including property management staff residing on the premises); or
>
> (2) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises.

24 C.F.R. § 5.859(a).

The federal regulations also provide that the property owner cannot terminate a lease except for several specifically listed causes, one of which is "[c]riminal activity by a covered person in accordance with" section 5.859. 24 C.F.R. § 880.607(b)(iii). The regulations go on to provide that while the property owner need only state the reasons for termination of the lease with "enough specificity so as to enable the tenant to prepare a defense," 24 C.F.R. § 247.4(a)(2), the owner "may not rely on any grounds which are different from the reasons set forth in the notice." 24 C.F.R. § 880.607(c)(3).

Mr. Ross' first issue is twofold. Mr. Ross initially claims that Broadway Towers can evict only for the reasons listed

on the termination notice and, because only Ms. Wheeler's felony conviction is listed on the notice, the Trial Court improperly considered Ms. Wheeler's other alleged criminal activity. Next, Mr. Ross claims that Ms. Wheeler's forgery conviction for conduct which occurred more than five years ago does not constitute criminal activity for which Broadway Towers can evict. We will discuss these two issues in reverse order.

Broadway Towers is a subsidized housing facility for elderly and disabled residents. If Ms. Wheeler will forge legal documents in an attempt to steal a substantial amount of money from her own elderly mother, then the other elderly and/or disabled residents of the premises cannot be excluded as potential future victims of Ms. Wheeler. Due to the nature of Ms. Wheeler's forgery conviction, there is no question but that she has engaged in criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents, which also unfortunately includes Mr. Ross.

The fact that the forgery took place roughly five years ago does not minimize the existence of the clear threat posed by Ms. Wheeler. The regulations authorized Broadway Towers to obtain the criminal history of Ms. Wheeler. *See* 24 C.F.R. § 5.855. These regulations do not provide any time limitation as to how far back the property owner may go when requesting a criminal history. We note, however, that the property owner "may establish a period before the admission decision during which an applicant must not have engaged" in the criminal activity that would threaten the health or safety of the other residents. 24 C.F.R. § 5.855(b). The criminal records authorization signed by Ms. Wheeler is unclear on how far back Broadway Towers goes when conducting a criminal records check. The

reason for this is because the authorization states it will go back "three (5) years." Although it is unclear whether the records check will go back "three" or "(5)" years, the result in this case is the same because Ms. Wheeler actually was convicted of the forgery only nine months before she signed the authorization. We conclude that Ms. Wheeler's felony forgery committed more than five years ago but for which Ms. Wheeler was convicted less than one and one-half years before the Notice was given and only nine months before she signed the criminal history authorization does indeed constitute criminal activity for which Broadway Towers could evict.

The next issue is whether the Trial Court improperly considered Ms. Wheeler's other criminal activity. Mr. Ross was notified that the Lease was being terminated because of Ms. Wheeler's criminal activity, specifically the "felony conviction which prohibits her from residing at Broadway Towers Apartments due to our one-strike policy which you signed upon moving in to our facility." When Broadway Towers obtained an accurate copy of Ms. Wheeler's criminal history, it discovered that Ms. Wheeler's criminal past involved more than the felony conviction. Again, we note that the federal regulations provide that the property owner "may not rely on any grounds which are different from the reasons set forth in the notice." 24 C.F.R. § 880.607(c)(3). Based on the clear language of the regulations, we believe the Trial Court should not have relied on anything in Ms. Wheeler's past other than the felony conviction. In its memorandum opinion, the Trial Court certainly mentioned Ms. Wheeler's other criminal activity, some of which still was pending in the criminal court

system at that time.[2] What is not clear is whether the Trial Court actually relied on anything other than the felony conviction when ultimately concluding that Broadway Towers had sufficient grounds to terminate the Lease. We vacate that portion of the Trial Court's judgment which discusses any aspect of Ms. Wheeler's criminal history other than her felony conviction. However, we affirm the ultimate determination made by the Trial Court because, as found by the Trial Court, "the defendants were clearly advised that Broadway Towers was at least concerned in this case about Mrs. Ross' conviction for forgery," and the felony conviction, standing alone, is more than sufficient for Broadway Towers to terminate the Lease. A fair reading of the Trial Court's Memorandum Opinion shows Mrs. Wheeler's felony conviction certainly formed the primary and quite possibly the exclusive basis for the Trial Court's determination.

Mr. Ross' next issue is his claim that the Trial Court erred in granting the detainer warrant when the termination notice contained no allegation of any breach by either Mr. Ross or Ms. Wheeler that occurred during the term of the Lease. We disagree. The federal regulations set forth above clearly entitle Broadway Towers to screen applicants and deny an application based on certain criminal conduct. In the Trial Court's memorandum opinion, the Trial Court correctly noted that had Ms. Wheeler "disclosed the fact that she had gone by the name of Norwood,

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[2] While this appeal was pending, Ms. Wheeler filed a motion to consider post-judgment facts which contained certified documents showing the assault charges brought against Ms. Wheeler had been dismissed. Due to our resolution of the various issues, this issue is moot.

[then] her criminal record would have been made evident to Broadway Towers earlier and she would not have been permitted to occupy the premises in the first place." The record fully supports this finding. Ms. Wheeler should not be permitted to escape the consequences of her misconduct simply because she gave a different name when providing her name for purposes of Broadway Towers conducting a criminal records check. If Ms. Wheeler had provided the name "Barbara Norwood," then she never would have been allowed to live in Broadway Towers in the first place. Therefore, it matters not that Mr. Ross and Ms. Wheeler did not engage in any conduct during the term of the Lease that would be considered in violation of that Lease. As found by the Trial Court and as supported by the record, the regulations involved in this case are for the benefit not only of Mr. Ross but also for all the other occupants of the subsidized housing project. To accept the Ross' position means that if a prospective tenant who clearly would not have been accepted to live in the subsidized housing project if her true criminal history was known manages to slip through, for whatever reason, then that tenant must be allowed to remain and all the other occupants of the subsidized housing project just have to accept the additional risk from her being allowed to continue living on the premises. Such a holding would be contrary to the intent of the regulations to protect all the occupants of the subsidized housing project.

The final issue is Mr. Ross' claim that because Broadway Towers accepted Mr. Ross' June 2005 rent payment without any reservation of rights, Broadway Towers has effectively condoned the alleged default and is estopped from terminating the Lease. Mr. Ross relies on Tenn. Code

Ann. § 66-28-508 which is part of Tennessee's Uniform Residential Landlord and Tenant Act and which states:

> If the landlord accepts rent without reservation and with knowledge of a tenant default, the landlord by such acceptance condones the default and thereby waives such landlord's right and is estopped from terminating the rental agreement as to that breach.

At the outset, we note that at least some rent would have been due through the 9th of June, even if the Lease was terminated and Mr. Ross moved from the premises on that date. Therefore, Broadway Towers would have been entitled to keep at least a portion of this rent payment. When rejecting Mr. Ross' argument on this issue, the Trial Court essentially determined that Broadway Towers had a "duty to enforce [the federal] regulations and enforce those lease provisions for the benefit of other tenants; and that they are not entitled to waive the right of other tenants to insist upon the enforcement of those regulations." In short, the Trial Court determined that the policies behind the federal regulations trumped the Landlord and Tenant Act in this regard. We agree.

In *Scarborough v. Winn Residential L.L.P./Atlantic Terrace Apartments,* 890 A.2d 249 (D.C. Ct. App. 2006), the District of Columbia Court of Appeals was confronted with the application of a provision in the District of Columbia Code which required landlords to give tenants a thirty day notice to correct a violation before the tenant could be evicted. The Court of Appeals needed to decide if the provision in the D.C. Code took precedence over HUD regulations, or vice versa. The landlord in *Scarborough* was attempting to evict a tenant because of the tenant's possession of an unregistered firearm. The landlord

claimed the tenant's possession of the firearm endangered the health and safety of the residents in the subsidized housing facility. *Id.* at 252. The tenant claimed she could not be evicted because the landlord failed to comply with a D.C. Code provision which required a thirty day notice to correct the violation. The D.C. Court of Appeals stated:

> Strictly speaking, the issue is not one of federal pre-emption of state action, but whether, "[i]n matters of the present sort, a congressional statute [and regulations] of national application prevail[ ] over a statute applying only to the District of Columbia." *In re Estate of Couse,* 850 A.2d 304, 305 n. 1 (D.C. 2004), quoting *District of Columbia v. Wolverton,* 112 U.S. App. D.C. 23, 24 n. 3, 298 F.2d 684, 685 n. 3 (1961). But, as no difference of substance has been suggested between that question and the issue of federal pre-emption, we apply the latter doctrine.
>
> Courts have identified three ways in which a federal statute can pre-empt state law: by express pre-emption, where statutory language "reveals an explicit congressional intent to pre-empt state law," *Barnett Bank of Marion County v. Nelson,* 517 U.S. 25, 31, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996); by field pre-emption, in which "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it,'" *Cipollone* [*v. Liggett Group, Inc.*], 505 U.S. [504,] 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 [(1992)] (citation and quotation marks omitted); and by implied or conflict pre-emption, which applies "'where compliance with both federal and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of

the full purposes and objecti[ves] of Congress.'" *Boggs v. Boggs,* 520 U.S. 833, 844, 117 S. Ct. 1754, 138 L. Ed. 2d 45 (1997) (citations omitted). . . .

The parties agree that this case does not involve express or field pre-emption, nor is compliance with both D.C. Code § 42-3505.01(b) and federal law a "physical impossibility." The question, rather, is whether application of the District's cure opportunity for criminal violations that threaten the safety or peace of other tenants would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." It is clear to us that it would.

Among the many conditions imposed by the Mod Rehab program (and by HUD's other housing assistance programs) are that specific provisions must appear in the written lease agreements with individual tenants. As relevant here, 42 U.S.C. § 1437f(d)(1)(B) states:

> Contracts to make assistance payments entered into by a public housing agency with an owner of existing housing units shall provide (with respect to any unit) that –
>
> * * *
>
> (iii) during the term of the lease, *any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants* . . . engaged in by a tenant of any unit . . . or any guest or other person under the tenant's control, "*shall be cause for*

> *termination of tenancy.*" [Emphasis added.]

In enacting this provision, as in enacting a parallel provision for public housing, *see* 42 U.S.C. § 1437d(*l*)(6), Congress declared that "the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs." 42 U.S.C. § 11901(1) (emphasis added).

* * *

Applying the cure provision of D.C. Code § 42-3505.01(b) would stand as a pronounced obstacle to the exercise of this authority. Not for nothing are lease provisions of the kind involved here described as manifesting a federal "One-Strike Policy." The only way to make sense of the idea of "correct[ing]" criminal activity would be to require the tenant not to engage in such activity again. But, as HUD points out in the government's brief *amicus curiae,* "this interpretation quickly renders the eviction provision a virtual nullity, because the grounds for eviction – the criminal act – would be washed away by a simple promise not to commit another crime." The very ease of thwarting the landlord's right to evict for commission of such a crime would frustrate the purpose of an anticrime provision that permits eviction for "any" criminal activity threatening in the sense defined.

It is true . . . that termination of a tenancy after criminal activity is not automatic under federal law; housing providers have discretion whether to exercise the right of eviction. *See Rucker,* 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258. But the cure opportunity provided by § 42-3505.01(b), if applicable to violations of "an

> obligation of tenancy" dangerously criminal in nature, would substitute for the landlord's discretion a mandatory second-strike opportunity for a tenant to stay eviction by discontinuing, or not repeating, the criminal act during the thirty days following notice. We do not believe Congress meant to permit that obligatory re-setting of the notice clock. . . .

Scarborough, 890 A.2d at 255-57.

We agree with the rationale in *Scarborough.* Even assuming, without deciding, that Broadway Towers can be said to have accepted the rent without reserving its rights and with full knowledge of the default[3], we think Tenn. Code Ann. § 66-28-508 has no application *to this case* given the facts of this case. Specifically, we believe the federal public policy in providing subsidized housing that is safe and crime-free for all the tenants is paramount to any policy at issue in Tenn. Code Ann. § 66-28-508. In light of the facts presented in this case, we conclude that even if the provisions of Tenn. Code Ann. § 66-28-508 were triggered, application of that statute is preempted by the federal regulations because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Scarborough,* 890 A.2d at 255 (quoting *Boggs v. Boggs,* 520 U.S. 833, 844, 117 S. Ct. 1754, 138 L. Ed. 2d 45 (1997)). Accordingly, the Trial Court correctly determined that Broadway Towers' acceptance of

[3] We note that the Trial Court found that Broadway Towers inadvertently accepted the rent check when it was placed through the slot in the door. This suggests a finding that the rent was not accepted with full knowledge of the alleged default. However, due to our conclusion that the state statute is preempted in this case, we need not decide whether the Trial Court's conclusion in this regard was correct.

the June 2005 rent check cannot be held as a waiver to its enforcement of the Lease provisions for the benefit of all the other tenants residing at that complex.

In conclusion, we affirm the Trial Court's judgment awarding possession of the apartment to Broadway Towers. Mr. Ross and Ms. Wheeler will have thirty days after the mandate is issued in this case in which to vacate the premises. In the meantime, Mr. Ross is to pay rent in accordance with the terms of the Lease.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellants, Arthur Jack Ross and Barbara Wheeler Ross, and their surety, if any.

D. MICHAEL SWINEY, JUDGE

IN THE CIRCUIT COURT OF TENNESSEE
KNOX COUNTY

Arthur Jack Ross and Barbara Wheeler Ross Petitioner, vs. Broadway Towers, Inc. (formerly Barbara Everence) Respondent.	Case No.: 3-438-05 **Notice of Entry Requested Per F.R.C.P. Rule 58**

Judgment

(Filed Jan. 3, 2006)

This cause came on for trial before the Hon. Wheeler A. Rosenbalm, Circuit Court Judge, on Nov. 23, 2005, with final argument on Dec. 9, 2005. In accordance with the Court's memorandum opinion rendered from the bench on Dec. 9, 2005, which is hereby incorporated into this Judgment by reference, it is hereby ordered, adjudged and decreed as follows:

1. Broadway Towers, Inc., is hereby granted possession of and restored to possession of the apartment located at Broadway Towers, 1508 McCroskey Ave., #519, Knoxville TN 37917.

2. Arthur Jack Ross and Barbara Wheeler Ross shall vacate the premises on or before Jan. 1, 2006, and shall pay rent through that date.

3. Writ of possession may issue according to law.

4. Costs are taxed to Arthur Jack Ross and Barbara Wheeler Ross.

Entered this 22nd day of Dec., 2005

/s/ Hon. Wheeler A. Rosenbalm
Hon. Wheeler A. Rosenbalm

Approved or Entry:

/s/ Donald K. Vowell
Donald K. Vowell
Attorney for the Respondent
6718 Albunda Drive
Knoxville, TN 37919
865/292-0000

/s/ Kendra J. Mansur by Donald K. Vowell
Kendra J. Mansur w/ permission
Legal Aid of East Tennessee
502 S. Gay Street, Suite 404
Knoxville, TN 37902
865/637-0484

DETAINER WARRANT [126. 50 DEM] [2]

STATE OF TENNESSEE,
COUNTY OF KNOX, To the Sheriff or other lawful officer of said county.

Whereas, complaint is made to me by Barbara Everence

1508 McCroskey Avenue KN TN 37917 Plaintiff(s)

Plaintiff(s) address & phone # 524-4092

of a certain forcible and unlawful entry and detainer by
Jack Ross Barbara Wheeler Defendant(s)

in a certain tract, lot, apartment, house or real estate situated in the County aforesaid and bounded or known and described as Follows: 1508 McCroskey Ave Apt 519
Knox TN 37917

Which land the plaintiff(s) alleges it is entitled the possession of and defendant(s) unlawfully detains from him/her/them.

We therefore command you to summon the defendant(s) to appear before the Court of General Sessions of Knox County, Tennessee, to be held at the courtroom of said court in Knox County on the 26 day of July 2005 at 9:00 a.m. to answer the complaint and claims for rents by Plaintiff(s) in the amount of $_____ and contractual attorney fees, if any, and cost of this cause.

INTERLOCUTORY ORDERS (IF ANY)

Date _____

Date _____

_____

Judge of Division _____ General Sessions Court

NO. 38849DT [3-438-05]

Barbara Everence

VS. Plaintiff(s)

Jack Ross Barbara Wheeler

1508 McCroskey Ave Apt 519

Address Defendant(s)

KN TN 37917

_____

DETAINER WARRANT

Court of General Sessions

[SERVED]

Issued this 6th day of July, 2005.

CATHERINE F. QUIST, CLERK

Mary J. Brown D.C. Came to hand same day issued and executed as commanded by reading the within warrant to:

X /s/ Jack Ross

X /s/ Barbara Wheeler

And citing Jack Ross Barbara Wheeler for trial on 26 day of July 2005.9 o'clock a.m.

SERVICE ATTEMPT DATES

DATES 1 July 25 2 _____ 3 _____

COPY OF WARRANT POSTED ON DOOR OF PREMISES.

COPY OF WARRANT OR SUMMONS MAILED VIA FIRST CLASS U.S. MAIL TO THE SO NAMED DEFENDANTS AT LAST KNOWN ADDRESS.

DATE _____

This 11 day of July 2005.

/s/ Officer 412

Sheriff (Constable)

Reset for 8-2-05

Reset for _____

Reset for _____

/s/ Donald Vowell 292-0000

Atty. for Pltf.

/s/ Kendra Mansur

Atty for Dfd.

[Legal Aid 637-0484]

JUDGMENT

It is hereby ordered and adjudged:

X That plaintiff(s) be restored to the possession of the within described property, for which a Writ of possession may issue, pursuant to the law and court costs are adjudged against the defendant(s).

That plaintiff(s) be restored to the possession of the within described property, and a judgment for

$ _____

and court costs.
Writ of Possession may issue.

That plaintiff(s) have a judgment for

$ _____

and court costs against the defendant(s).

Judgment is granted in favor of the defendant,

Dismiss-cost taxed against Pltf/Dfd.

Nonsuit-cost taxed against Pltf/Dfd.

Other _____

_____

_____

DEFAULT [TRIAL] AGREED

This the 7 day of Aug 2005

/s/ Geoff Emery _____
JUDGE

Damages _____

This the _____ day of _____ 20 __

_____
JUDGE

NOTICE TO THE DEFENDANT(S)

Tennessee law provides a four thousand dollar ($4,000.00) personal property exemption from execution or seizure to satisfy a judgment. If a judgment should be entered

against you in this action and you wish to claim property as exempt, you must file a written list, under oath, of the items you wish to claim as exempt with the clerk of the court. The list may be filed at any time and may be changed by you thereafter as necessary; however, unless it is filed before the judgment becomes final, it will not be effective as to any execution or garnishment issued prior to the filing of the list. Certain items are automatically exempt by law and do not need to be listed; these include items of necessary wearing apparel (clothing) for yourself and your family and trunks or other receptacles necessary to contain such apparel, family portraits, the family Bible, and school books. Should any of these items be seized you have the right to recover them. If you do not understand your exemption right or how to exercise it, you may wish to seek the counsel of a lawyer.

MILITARY AFFIDAVIT

The undersigned does solemnly swear that the defendant(s) is not in the armed forces of the U.S.A., according to the best of his/her knowledge, information, and belief.

_____

Sworn and subscribed to before me this the 6 day

July 2005

CATHERINE F. QUIST
General Sessions Court Clerk

By: Barbara Everence D.C.

/s/ DC Mary J Brown

_____

**** NOTICE ****

The American with Disabilities Act prohibits discrimination against any qualified individual with a disability. The Tennessee Judicial Branch does not permit discrimination against any individual on the basis of physical or mental disability in accessing its judicial programs. In accordance with the Americans with Disabilities Act, if necessary, the Tennessee Judicial Branch will provide reasonable modifications in order to access all of its programs, services and activities to qualified individuals with disabilities.

If you need assistance, have questions or need additional information, please contact the Local Judicial Program ADA Coordinator:

Pat Carson, Compliance Officer
Knox County Human Resources Office
Suite 360 City-County Building
400 Main Street, Knoxville, Tennessee 37902
Voice Phone: 215-2952 TTY: 215-2497

The Tennessee Judicial Branch Americans with Disabilities Act Regarding Access to Judicial Programs, as Well as a Request for Modification form may be found online at www.tsc.state.tn.us.

If you require a modification to access the judicial program and/or have special needs because of a qualified disability, you must submit a written Request for Modification to the Local Judicial Program ADA Coordinator listed below at least five (5) business days prior to the date of the judicial program, if possible. A form is available from the Local Judicial Program ADA Coordinator or from the Tennessee Judicial Program ADA Coordinator. http://www.tsc.state.tn.us

If you need assistance, have question or need additional information, you may also contact the Tennessee Judicial Program ADA Coordinator:

Pamela Taylor, Manager/Coordinator
STATE Judicial ADA Program
Administrative Office of the Courts
Nashville City Center, Suite 600, 511 Union Street
Nashville, Tennessee 37219
615-741-2687 Fax: 615-741-6285

BOND

The undersigned Principal and Surety do hereby bind themselves, their heirs and assigns, to the defendant(s), in the penal sum of Fifty Dollars, conditioned to pay all costs and damages which shall accrue to said defendant(s) for the wrongful prosecution of this suit.

This _____ day of _____, 20 _____

_____
Principal

_____
Surety

_____

_____

APPEAL

From the judgment on the reverse side, the _____

_____
prayed on appeal to the Circuit Court which is granted upon Pauper's Oath or Appeal Bond.

This _____ day of _____, 20 _____

Total cost of Appeal $ _____

Paid for by the Pltf. $ _____

_____

Judge of Div. _____ of the Court of General Sessions,
Civil Division

Arthur Jack Ross et al v. Broadway Towers, Inc.

E2006-00033-SC-R11-CV

**SUPREME COURT OF TENNESSEE,
AT KNOXVILLE**

2007 Tenn. LEXIS 622

June 25, 2007, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

OPINION

Application of Arthur Jack Ross for Discretionary Appeal Denied.

U.S.C.S. Const. Art. VI Cl. 2. Supreme law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

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42 U.S.C. § 1437d. Contract Provisions and Requirements; loans and annual contributions.

(l) Leases; terms and conditions; maintenance; termination. Each public housing agency shall utilize leases which –

(6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy; except that: (A) criminal activity directly relating to domestic violence, dating violence, or stalking, engaged in by a member of a tenant's household or any guest or other person under the tenant's control, shall not be cause for termination of the tenancy or occupancy rights, if the tenant or immediate member of the tenant's family is a victim of that domestic violence, dating violence, or stalking; (B) notwithstanding subparagraph (A) or any Federal, State, or local law to the contrary, a public housing agency may bifurcate a lease under this section, or remove a household member from a lease under this section, without regard to whether a household member is a signatory to a lease, in order to evict, remove, terminate occupancy rights, or terminate assistance to any individual who is a tenant or lawful occupant and who engages in criminal acts of physical violence against family members or others, without evicting, removing, terminating assistance to, or otherwise penalizing the victim of such violence who is also a tenant or lawful occupant and such eviction, removal, termination of occupancy rights, or termination of assistance shall be effected in accordance with the procedures prescribed by Federal, State, and local law for the termination of leases or assistance under the relevant program of HUD-assisted housing; (C) nothing in subparagraph (A) may be construed to limit the authority of a public housing agency, when notified, to honor court orders addressing rights of access to or control of the property,

including civil protection orders issued to protect the victim and issued to address the distribution or possession of property among the household members in cases where a family breaks up; (D) nothing in subparagraph (A) limits any otherwise available authority of a public housing agency to evict a tenant for any violation of a lease not premised on the act or acts of violence in question against the tenant or a member of the tenant's household, provided that the public housing agency does not subject an individual who is or has been a victim of domestic violence, dating violence, or stalking to a more demanding standard than other tenants in determining whether to evict or terminate; (E) nothing in subparagraph (A) may be construed to limit the authority of a public housing agency to terminate the tenancy of any tenant if the public housing agency can demonstrate an actual and imminent threat to other tenants or those employed at or providing service to the property if that tenant's tenancy is not terminated; and (F) nothing in this section shall be construed to supersede any provision of any Federal, State, or local law that provides greater protection than this section for victims of domestic violence, dating violence, or stalking[.];

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42 U.S.C. § 1437f. Low-income housing assistance

(d) Required provisions and duration of contracts for assistance payments; waiver of limitation

(1) Contracts to make assistance payments entered into by a public housing agency with an owner of existing housing units shall provide (with respect to any unit) that –

(B)

(iii) during the term of the lease, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, or any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy, except that: (I) criminal activity directly relating to domestic violence, dating violence, or stalking, engaged in by a member of a tenant's household or any guest or other person under the tenant's control, shall not be cause for termination of the tenancy or occupancy rights or program assistance, if the tenant or immediate member of the tenant's family is a victim of that domestic violence, dating violence, or stalking; (II) Notwithstanding subclause (I) or any Federal, State, or local law to the contrary, a public housing agency may terminate assistance to, or an owner or manager may bifurcate a lease under this section, or remove a household member from a lease under this section, without regard to whether a household member is a signatory to a lease, in order to evict, remove, terminate occupancy rights, or terminate assistance to any individual who is a tenant or lawful occupant and who engages in criminal acts of physical violence against family members or others, without evicting, removing, terminating assistance to, or otherwise penalizing the victim of such violence who is also a tenant or lawful occupant. Such eviction, removal, termination of occupancy rights, or termination of assistance shall be effected in accordance

with the procedures prescribed by Federal, State, and local law for the termination of leases or assistance under the relevant program of HUD-assisted housing.[;] (III) nothing in subclause (I) may be construed to limit the authority of a public housing agency, owner, or manager, when notified, to honor court orders addressing rights of access to or control of the property, including civil protection orders issued to protect the victim and issued to address the distribution or possession of property among the household members in cases where a family breaks up; (IV) nothing in subclause (I) limits any otherwise available authority of an owner or manager to evict or the public housing agency to terminate assistance to a tenant for any violation of a lease not premised on the act or acts of violence in question against the tenant or a member of the tenant's household, provided that the owner, manager, or public housing agency does not subject an individual who is or has been a victim of domestic violence, dating violence, or stalking to a more demanding standard than other tenants in determining whether to evict or terminate; (V) nothing in subclause (I) may be construed to limit the authority of an owner or manager to evict, or the public housing agency to terminate assistance, to any tenant if the owner, manager, or public housing agency can demonstrate an actual and imminent threat to other tenants or those employed at or providing service to the property if that tenant is not evicted or terminated from assistance; and (VI) nothing in this section shall be construed to supersede any provision of any Federal, State, or local law that provides greater protection than this section for victims of domestic violence, dating violence, or stalking[.]; arole imposed under Federal or State law;

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42 U.S.C. § 11901. Congressional findings

The Congress finds that –

(1) the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs;

(2) public and other federally assisted low-income housing in many areas suffers from rampant drug-related or violent crime;

(3) drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants;

(4) the increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures;

(5) local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of the recent reductions in Federal aid to cities;

(6) the Federal Government should provide support for effective safety and security measures to combat drug-related and violent crime, primarily in and around public housing projects with severe crime problems;

(7) closer cooperation should be encouraged between public and assisted housing managers, local law enforcement agencies, and residents in developing and implementing anti-crime programs; and

(8) anti-crime strategies should be improved through the expansion of community-oriented policing initiatives.

---

24 CFR § 5.855 When am I specifically authorized to prohibit admission of individuals who have engaged in criminal activity?

(a) You may prohibit admission of a household to federally assisted housing under your standards if you determine that any household member is currently engaging in, or has engaged in during a reasonable time before the admission decision:

(1) Drug-related criminal activity;

(2) Violent criminal activity;

(3) Other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents; or

(4) Other criminal activity that would threaten the health or safety of the PHA or owner or any employee, contractor, subcontractor or agent of the PHA or owner who is involved in the housing operations.

(b) You may establish a period before the admission decision during which an applicant must not have engaged in the activities specified in paragraph (a) of this section (reasonable time).

(c) If you previously denied admission to an applicant because of a determination concerning a member of the household under paragraph (a) of this section, you may reconsider the applicant if you have sufficient evidence that the members of the household are not currently

engaged in, and have not engaged in, such criminal activity during a reasonable period, determined by you, before the admission decision.

(1) You would have sufficient evidence if the household member submitted a certification that she or he is not currently engaged in and has not engaged in such criminal activity during the specified period and provided supporting information from such sources as a probation officer, a landlord, neighbors, social service agency workers and criminal records, which you verified. (See subpart J of this part for one method of checking criminal records.)

(2) For purposes of this section, a household member is currently engaged in the criminal activity if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current.

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24 CFR § 5.858 What authority do I have to evict drug criminals?

The lease must provide that drug-related criminal activity engaged in on or near the premises by any tenant, household member, or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for you to terminate tenancy. In addition, the lease must allow you to evict a family when you determine that a household member is illegally using a drug or when you determine that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

---

24 C.F.R. § 5.859 When am I specifically authorized to evict other criminals?

(a) Threat to other residents. The lease must provide that the owner may terminate tenancy for any of the following types of criminal activity by a covered person:

(1) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including property management staff residing on the premises); or

(2) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises.

(b) Fugitive felon or parole violator. The lease must provide that you may terminate the tenancy during the term of the lease if a tenant is:

(1) Fleeing to avoid prosecution, or custody or confinement after conviction, for a crime, or attempt to commit a crime, that is a felony under the laws of the place from which the individual flees, or that, in the case of the State of New Jersey, is a high misdemeanor; or

(2) Violating a condition of probation or parole imposed under Federal or State law.

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24 C.F.R. § 247.6 Eviction.

(a) General. The landlord shall not evict any tenant except by judicial action pursuant to State or local law and in accordance with the requirements of this subpart.

(b) Limitations on allegations of new grounds. In any judicial action instituted to evict the tenant, the landlord must rely on grounds which were set forth in the termination notice served on the tenant under this subpart. The landlord shall not, however, be precluded from relying on grounds about which he or she had no knowledge at the time the termination notice was sent.

(c) State and local law. A tenant may rely on State or local law governing eviction procedures where such law provides the tenant procedural rights which are in addition to those provided by this subpart, except where such State or local law has been preempted under Part 246 of this chapter or by other action of the United States.

Tenn. Code Ann. § 66-28-103. Purposes - Rules of construction.

(a) This chapter shall be liberally construed and applied to promote its underlying purposes and policies.

(b) Underlying purposes and policies of this chapter are to:

(1) Simplify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations of landlord and tenant;

(2) Encourage landlord and tenant to maintain and improve the quality of housing;

(3) Promote equal protection to all parties; and

(4) Make uniform the law in Tennessee.

(c) Unless displaced by the provisions of this chapter, the principles of law and equity, including the law

relating to capacity to contract, health, safety and fire prevention, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions.

(d) This chapter being a general chapter intended as a unified coverage of its subject matter, no part of it is to be construed as impliedly repealed by subsequent legislation if that construction can reasonably be avoided.

Tenn. Code Ann. § 66-28-508. Waiver of landlord's right to terminate.

If the landlord accepts rent without reservation and with knowledge of a tenant default, the landlord by such acceptance condones the default and thereby waives such landlord's right and is estopped from terminating the rental agreement as to that breach.

MOTION FILED
OCT 26 2007

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No. 07-417

In The
Supreme Court of the United States

ARTHUR J. ROSS, ET UX.,

Petitioners,

v.

BROADWAY TOWERS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Tennessee Court Of Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; AND BRIEF *AMICUS CURIAE* OF THE HOUSING LAW CLINIC CONSORTIUM IN SUPPORT OF PETITIONERS

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MOTION OF THE HOUSING LAW CLINIC CONSORTIUM FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37 of the Rules of this Court, the Housing Law Clinic Consortium (HLCC) respectfully moves this Honorable Court for leave to file the attached brief in the above-referenced case in support of the petition for writ of certiorari. The Petitioner has consented to the HLCC's participation in this case, and a letter indicating the Petitioner's consent has been submitted to this Court.[1]

HLCC is a nationwide organization founded by the University of Tennessee Legal Clinic representing the legal clinics of various law schools around the country. The University of Tennessee Legal Clinic filed a brief as *amicus curiae* at the state level when the Tennessee Supreme Court considered the Petitioner's request for leave to appeal. When the Petitioners appealed to this Honorable Court, the University of Tennessee Legal Clinic brought the case to the attention of other legal clinics. These clinics realized the national significance of the *Ross* decision and the impact the decision could have on their states' abilities to provide defenses to tenants in eviction proceedings. Thus, these clinics united with the University of Tennessee Legal Clinic to form the HLCC. HLCC

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[1] Respondent Broadway Towers, Inc., affirmatively denied consent. Respondent also objected at the state court level to the University of Tennessee Legal Clinic's filing of a brief as *amicus curiae*. Nevertheless, the Tennessee Supreme Court granted the University of Tennessee Legal Clinic leave to file a brief as *amicus curiae*. *Ross v. Broadway Towers, Inc.*, Order, No. E2006-00033-SC-R11-CV (Tenn. Sup. Ct. June 25, 2007).

members adhere to a two-part mission: (1) providing legal assistance to the indigent in members' respective communities and (2) engaging law students in housing and other civil cases to provide them with "real world" experience. The following legal clinics and legal clinicians are members of the HLCC:

The University of Tennessee Legal Clinic

The Economic Justice Project of the Notre Dame Legal Aid Clinic

The Michigan Clinical Law Program of the University of Michigan Law School

The Legal Clinic of the Saint Louis University School of Law

The Willamette University College of Law Clinical Law Program

Professors Russell G. Pearce & Douglass Seidman, Fordham University School of Law

The Clinical Programs of the Roger Williams College of Law

The Center for Social Justice, Seton Hall Law School

The Duke Law School Community Enterprise Clinic

Rosalie Wahl Legal Practice Center, William Mitchell College of Law

Professor Ellen M. Scully, The Catholic University of America Columbus School of Law

HLCC members provide indigent tenants with legal assistance and support in landlord-tenant cases. A substantial number of these tenants are elderly and reside in housing funded by the Department of Housing and Urban Development (HUD). Some of them have been evicted for alleged criminal activity in contravention to HUD's regulations.

This case seriously affects the HLCC because it erodes the defenses available to clients of HLCC members, making it difficult for HLCC members to predict when state law defenses will be available in a given case. Landlord-tenant law has always been governed by state law. In the aftermath of this decision, HLCC members lack guidance in how to counsel their clients and teach their students about the force of state law in landlord-tenant cases involving federally funded housing. Therefore, the HLCC respectfully requests the opportunity to advise this Court more fully on the urgency of granting the Petition for Writ of *Certiorari*.

Respectfully submitted,

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(Admission Pending)
Director of Clinical Programs
THE UNIVERSITY OF TENNESSEE
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On behalf of the Housing Law Clinic Consortium:

THE UNIVERSITY OF TENNESSEE
LEGAL CLINIC
THE ECONOMIC JUSTICE PROJECT OF
THE NOTRE DAME LEGAL AID CLINIC
THE MICHIGAN CLINICAL LAW PROGRAM
OF THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
THE LEGAL CLINIC OF THE SAINT LOUIS
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Amicus Curiae

STATEMENT OF ISSUE PRESENTED

Does a federal statute authorizing landlords to include in rental agreements a right to evict tenants for criminal activity preempt the laws in at least 43 states providing eviction procedures and permitting defenses to evictions?

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BRIEF *AMICUS CURIAE* OF THE HOUSING LAW CLINIC CONSORTIUM[1]

INTEREST OF *AMICUS*

The University of Tennessee Legal Clinic ("the Clinic") is the longest continuously running law school clinic in the United States. Founded in 1947, the Clinic provides legal aid and counsel to indigent persons. Housing law is one of the Clinic's principle practice areas. The Clinic regularly represents low-income tenants of public and subsidized housing who are threatened with eviction on the basis of criminal activity allegedly committed either by them or by members of their households. In these cases we defend eviction actions in state courts under Tennessee's landlord-tenant laws.

Because of the threat *Ross v. Broadway Towers, Inc.*[2] poses to the stability of landlord-tenant laws in states across the country, the Clinic contacted other Clinical Law Programs to see if they would be interested in forming a consortium dedicated to stopping the *Ross* decision's detrimental effects on state landlord-tenant law. The following professors and clinics have joined the Clinic to form the Housing Law Clinic Consortium:

The Economic Justice Project of the Notre Dame Legal Aid Clinic

The Michigan Clinical Law Program of the University of Michigan Law School

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[1] The petitioner, Ross, has granted consent for the filing of this amicus curiae brief. The respondent, Broadway Towers, Inc., has withheld consent and unsuccessfully objected to our filing in state court. *See Ross v. Broadway Towers, Inc.*, Order, No. E2006-00033-SC-R11-CV (Tenn. Sup. Ct. June 25, 2007).

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] 228 S.W.3d 113 (Tenn. Ct. App. 2006).

The Legal Clinic of the Saint Louis University School of Law

The Willamette University College of Law Clinical Law Program

Professors Russell G. Pearce & Douglass Seidman, Fordham University School of Law

The Clinical Programs of the Roger Williams College of Law

The Center for Social Justice, Seton Hall Law School

The Duke Law School Community Enterprise Clinic

Rosalie Wahl Legal Practice Center, William Mitchell College of Law

Professor Ellen M. Scully, The Catholic University of America Columbus School of Law

The Housing Law Clinic Consortium is interested in this case because the holding of the Tennessee Court of Appeals in *Ross v. Broadway Towers, Inc.*[3] will have a disastrous effect on the state law procedures and protections in Tennessee and throughout the United States. The court's holding opens the door for courts to preempt any and all state law tenant protections in federal housing if the tenant is being evicted for alleged criminal activity or for any other reason of interest to the federal government. Finally, the Tennessee Court of Appeals decision is an indication of the courts' confusion over the role of federal housing laws within state landlord-tenant law, which is a field traditionally regulated by the states. As an entity that represents the rights of the indigent – a group whose voice is all too seldomly heard – we ask permission to file this brief as *Amicus Curiae* under Supreme Court Rule 37.2.

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[3] *Id.*

I. BACKGROUND

A. The Tennessee Court of Appeals Holding in *Ross v. Broadway Towers, Inc.*

In *Ross v. Broadway Towers, Inc.*,[4] the Tennessee Court of Appeals addressed the issue of whether federal law preempts the various procedural and substantive protections granted under state landlord-tenant law. The specific statute at issue, Tennessee Code Annotated section 66-28-508, provides: "If the landlord accepts rent without reservation and with knowledge of a tenant default, the landlord by such acceptance condones the default and thereby waives such landlord's right and is estopped from terminating the rental agreement as to that breach."[5] The landlord in *Ross* had accepted rent without reservation, but the court held that the federal interest in evicting tenants accused of criminal activity preempts the due process guarantees in section 66-28-508.[6]

The holding in *Ross* could have nationwide impact because it preempts a tenant protection recognized by many states as part of the Uniform Residential Landlord and Tenant Act (URLTA)[7] or common law. Moreover, the reasoning of *Ross* suggests that any state-level tenant protections could be preempted solely on the basis of the federal interest in evicting tenants who are allegedly involved in criminal activity or for any other reason of interest to the federal government. As discussed *infra*, preemption analysis does not support the Tennessee Court of Appeals's decision. The court failed to consider that the federal laws at issue clearly indicate in express language

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[4] *Id.* Petitioners requested permission to appeal the decision to the Tennessee Supreme Court, but that court denied certiorari. *Ross v. Broadway Towers, Inc.*, E2006-00033-SC-R11-CV, 2007 Tenn. LEXIS 622, at *1 (Tenn. Sup. Ct. June 25, 2007).

[5] Tenn. Code Ann. § 66-28-508 (2004).

[6] *Ross*, 228 S.W.3d at 124.

[7] Unif. Residential Landlord & Tenant Act (URLTA) (amended 1974).

that Congress did not intend to preempt state eviction procedures or tenant procedural rights. Furthermore, the federal and state laws may be read together in such a way as to obviate the need for preemption.

B. The Uniform Residential Landlord and Tenant Act

The URLTA was drafted in 1972 as a means of acknowledging and codifying the evolution of modern, urban, residential landlord-tenant relationships.[8] The URLTA was designed as a "general act intended as a unified coverage of" the field.[9] Like many other national uniform acts, the URLTA is meant to clarify and standardize an area of traditional state law by drafting consistent statutes and encouraging their passage by each state. The broad scope of the URLTA includes jurisdictional provisions; descriptions of allowed and disallowed lease terms; landlords' and tenants' obligations and remedies; and prohibitions against retaliation, self-help, and "abuse of access."[10] Among the parties' rights and obligations are various methods by which either party may terminate the rental agreement and, in the case of termination for an alleged breach of the lease, a series of potential defenses that the allegedly breaching party may assert.[11]

The Tennessee General Assembly adopted the URLTA (Tennessee Uniform Residential Landlord and Tenant Act, or "TURLTA") in 1975[12] to govern the landlord-tenant relationship in all of its large counties.[13] The TURLTA specifies that it should be "liberally construed and applied

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[8] *See* URLTA § 1.102 & cmt.

[9] URLTA § 1.104 & cmt.

[10] *See generally* URLTA arts. I-V (stating these provisions in detail).

[11] *See generally* URLTA art. IV (providing various tenant and landlord remedies).

[12] 1975 Tenn. Pub. Acts 462.

[13] Tenn. Code Ann. § 66-28-102 (2004).

to promote its underlying purposes and policies."[14] Those purposes are to:

> (1) [s]implify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations of landlord and tenant; (2) [e]ncourage landlord and tenant to maintain and improve the quality of housing; (3) [p]romote equal protection to all parties; and (4) [m]ake uniform the law in Tennessee.[15]

One of TURLTA's provisions, Tennessee Code Annotated section 66-28-508, provides: "If the landlord accepts rent without reservation and with knowledge of a tenant default, the landlord by such acceptance condones the default and thereby waives such landlord's right and is estopped from terminating the rental agreement as to that breach."[16] The basis of this provision is a well-known contract principle of waiver.[17] A landlord cannot claim that a rental agreement is invalid while at the same time accepting rent without reservation as if the lease were valid.

C. The National Housing Act and Its Enacting Regulations

Section 1701q of the National Housing Act ("the Act") provides for federally funded housing for elderly persons.[18] The Act governs the loans, mortgages, and insurance to be used in funding these housing projects and places the projects under the supervision and coordination of the United States Department of Housing and

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[14] § 66-28-103.

[15] § 66-28-103(b)(1)-(4).

[16] § 66-28-508.

[17] *See, e.g.*, Restatement (Second) of Contracts § 246(1) (1981); *94th Aero Squadron of Memphis, Inc. v. Memphis-Shelby County Airport*, 169 S.W.3d 627, 635-36 (Tenn. Ct. App. 2004).

[18] 12 U.S.C. § 1701q (2000).

Urban Development (HUD).[19] Pursuant to this mandate, HUD has promulgated regulations describing standards for facility design, costs, and project management, including collection and use of security deposits and selection of tenants.[20] The purpose of the Act is to "provide Federal capital advances and project rental assistance . . . for housing projects serving elderly households . . . [and] provide a range of services that are tailored to the needs of the residents."[21] The regulations also require landlords to include provisions in their rental agreements stating that the lease may be terminated for "[a]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including property management staff residing on the premises). . . ."[22]

The HUD regulations only specify a particular lease provision that must be included; they say nothing about state contract law or state eviction proceedings. Nowhere in the regulations does the Department set forth or modify state contract defenses or eviction procedures, which HUD instead leaves specifically to state law. HUD provides:

> State and local law. A tenant may rely on State or local law governing eviction procedures where such law provides the tenant procedural rights which are in addition to those provided by this subpart, except where such State or local law has been preempted under Part 246 of this chapter or by other action of the United States.[23]

The statute at issue here, section 66-28-508 of TURLTA, as well as identical statutes and judicially created laws in 42 other states, provide tenants such a procedural right.

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[19] *Id.*; *see* § 1701c (empowering the Secretary of Housing and Urban Development).

[20] 24 C.F.R. pt. 891 (2006).

[21] § 891.100.

[22] § 5.859(a); *see* § 891.430 (incorporating the provisions of § 5.859 by reference).

[23] § 247.6(c); *cf.* § 246 (relating to local rent control).

II. ARGUMENT

A. Review is warranted on the issue of whether the housing laws in at least 43 states are preempted by a HUD regulation.

1. Many states have adopted the same landlord-tenant laws, but federal and state courts in those jurisdictions have treated the preemption issue inconsistently.

Twenty-one states have passed the URLTA in one form or another.[24] Furthermore, 14 of those states have passed the statute that is the subject of this case,[25] while an additional 29 states use a common law rule that mirrors the URLTA provision.[26]

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[24] Unif. Residential Landlord & Tenant Act, 7B U.L.A. 1, 1 (Supp. 2007); *see* Ala. Code §§ 35-9A-101 to -603 (1991); Alaska Stat. §§ 34.03.010 to 34.03.380 (2006); Ariz. Rev. Stat. Ann. §§ 33-1301 to -1381 (2007); Conn. Gen. Stat. §§ 47a-1 to 47a-20a (2006); Fla. Stat. §§ 83.40-83.67 (2000); Haw. Rev. Stat. §§ 521-1 to -78 (2006); Iowa Code §§ 562A.1-562A.37 (1992); Kan. Stat. Ann. §§ 58-2540 to 58-2573 (2005); Ky. Rev. Stat. Ann. §§ 383.500-383.715 (West 2002); Mich. Comp. Laws §§ 554.601-554.616 (2005); Miss. Code Ann. §§ 89-8-1 to 89-8-52 (1999); Mont. Code Ann. § 70-24-101 to 70-24-442 (2007); Neb. Rev. Stat. §§ 76-1401 to 76-1449 (2003); N.M. Stat. §§ 47-8-1 to 47-8-52 (1978); Okla. Stat. tit. 41, §§ 101-136 (1999); Or. Rev. Stat. §§ 90.100-90.940 (2005); R.I. Gen. Laws §§ 34-18-1 to 34-18-57 (1995); S.C. Code Ann. §§ 27-40-10 to 27-40-940 (2007); Tenn. Code Ann. §§ 66-28-101 to -521 (2004); Va. Code Ann. §§ 55-248.2 to 55-248.40 (2007); Wash. Rev. Code §§ 59.18.010-59.18.430 (2006).

[25] Ala. Code § 35-9A-424 (1991); Alaska Stat. 34.03.240 (2006); Ariz. Rev. Stat. Ann. § 33-1371 (2007); Conn. Gen. Stat. § 47a-19 (2006); Fla. Stat. § 83.56(5) (2000); Iowa Code § 562A.30 (1992); Kan. Stat. Ann. § 58-2566 (2005); Ky. Rev. Stat. Ann. § 383.675 (2002); Mont. Code Ann. § 70-24-243 (2007); Neb. Rev. Stat. § 76-1433 (2003); Or. Rev. Stat. § 90.415(1)(A) (2005); R.I. Gen. Laws § 34-18-41 (1995); Tenn. Code Ann. § 66-28-508 (2004); Va. Code Ann. § 55-248.34:1 (2007).

[26] *See, e.g.*, *Abernathy v. Adous*, 49 S.W.3d 884, 889 (Ark. App. 2004) (commercial lease); *Savett v. Davis*, 29 Cal. App. 4th Supp. 13, 16 (Cal. App. Dep't Super. Ct. 1994); *Merkowitz v. Mahoney*, 215 P.2d 317, 320 (Colo. 1949); *Shannon & Luchs Co. v. Tindal*, 415 A.2d 805, 806 (D.C. 1980); *Oastler v. Wright*, 40 S.E.2d 531, 533-34 (Ga. 1946); *Riverside Dev. Co. v. Ritchie*, 650 P.2d 657, 662 (Idaho 1982); *Wang v.*

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The state and federal courts are split on the issue of whether and when federal preemption occurs in the housing area.[27] Two state appellate courts that have

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Marcus Brush Co., 823 N.E.2d 140, 141 (Ill. App. 2005) ("The acceptance of rent, even after a notice to quit has been given, is not itself a waiver, but merely evidence to be considered in accordance with all the circumstances."); *HK New Plan Marwood Sunshine Cheyenne, LLC v. Onofrey Food Servs.*, 846 N.E.2d 318, 324 (Ind. App. 2006); *Housing Auth. of Town of Lake Providence v. Burks*, 486 So.2d 1068, 1069 (La. App. 1986); *Slater v. Krinsky*, 416 N.E.2d 983, 985 (Mass. App. 1981); *Chertkof v. Southland Corp.*, 371 A.2d 124, 127 (Md. 1977); *Barber v. Stone*, 62 N.W. 139, 140 (Mich. 1895); *Oak Glen of Edina v. Brewington*, 642 N.W.2d 481, 486 (Minn. App. 2002); *Langdon v. United Rests., Inc.*, 205 S.W.3d 882, 890 (Mo. App. 2003) ("Performance of certain lease terms may be waived when a landlord, by expression or conduct, leads the tenant to believe strict compliance is not required. . . . Such belief may be reasonable when induced by the landlord's continued acceptance of rent payments . . ."); *Reno Realty & Inv. Co. v. Hornstein*, 301 P.2d 1051, 1054 (Nev. 1956) (commercial lease); *Coon v. Brickett*, 2 N.H. 163 (1819); *Jasontown Apartments v. Lynch*, 382 A.2d 688, 692 (N.J. Super. App. Div. 1978) ("Acceptance of rent after a notice changing tenancy or after (a) notice to quit does not necessarily operate to waive the notice. While the unconditional acceptance by a landlord of moneys as rent, which rent as accrued after the time the tenant should have surrendered possession, will constitute strong evidence of the landlord's waiver of the notice to quit, waiver always rests on intent, and is ever a question of fact."); *Easterling v. Peterson*, 753 P.2d 902, 903 (N.M. 1988); *Atkin's Waste Materials, Inc. v. May*, 314 N.E.2d 871, 873 (N.Y. 1974); *Winder v. Martin*, 111 S.E. 708, 709 (N.C. 1922); *Associated Estates Corp. v. Bartell*, 492 N.E.2d 841, 845 (Ohio App. 1985); *Broken Arrow P'ship v. PBC Inv. Opportunities, Inc.*, 33 P.3d 694, 698 (Okla. Civ. App. 2001); *Brown v. Brown*, 64 A.2d 506, 507-08 (Pa. 1949) (acceptance of rent is evidence of waiver); *G.C. Murphy Co. v. Lack*, 404 S.W.2d 853, 859 (Tex. Ct. Civ. App. 1966); *Maidstone v. Stevens*, 7 Vt. 487 (1835); *Wilson v. Daniels*, 198 P.2d 496, 500 (Wash. 1949); *Dunbar Housing Auth. v. Nesmith*, 400 S.E.2d 296, 299 (W. Va. 1990); *Gomber v. Hackett*, 6 Wis. 323 (1857); *Larsen v. Sjogren*, 226 P.2d 177, 183 (Wyo. 1951).

[27] *See, e.g., TOPA Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065, 1072 (9th Cir. 2003) ("Here, although Congress (or perhaps HUD) could have chosen to preempt [state] rent control ordinances . . . it did not do so. In the absence of such action, we will not arrogate that power to ourselves."); *Booker v. Edwards*, 99 F.3d 1165, 1169 (D.C. Cir. 1996) (holding that the federal scheme was sufficiently robust on the question at issue, even if federal law is not meant to completely occupy the field);

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directly considered whether federal law preempts state law protections for public housing tenants have found preemption.[28] The Supreme Court of Virginia, on the other hand, has found that the congressional policy of providing safe and affordable housing did not "re-write" state landlord-tenant law and that "the intent of Congress was to leave the applicable state law undisturbed."[29] Further, this Honorable Court has indicated in dicta that when a public housing landlord initiates eviction proceedings because of drug-related activity, the question of whether the tenant received proper notice is for the state court.[30]

Preemption law has been in a state of flux following this Honorable Court's decision in *Cipollone v. Liggett Group, Inc.*[31] In particular, confused application of the majority and plurality opinions in that case has led to disagreement about when to apply the presumption against federal preemption in areas of law traditionally regulated by the states.[32] There has been growing concern since *Cipollone* that the presumption against preemption has ceased to operate[33] and debate about whether it should continue to exist.[34]

Scarborough v. Winn Residential LLP/Atl. Terrace Apartments, 890 A.2d 249 (D.C. Ct. App. 2006) (holding that federal law preempted a local ordinance because the ordinance would interfere with Congress's objectives in passing the federal law).

[28] *Scarborough v. Winn Residential, LLP/Atl. Terrace Apartments*, 290 A.2d 249 (D.C. Ct. App. 2006); *Ross v. Broadway Towers, Inc.*, 228 S.W.3d 113 (Tenn. Ct. App. 2006).

[29] *Carter v. Meadowgreen Assocs.*, 597 S.E.2d 82, 84 (Va. 2004).

[30] *Dep't of Housing & Urb. Dev. v. Rucker*, 535 U.S. 125, 135-36 (2002).

[31] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

[32] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[33] *See, e.g.*, Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. Rev. 967 (2002) (arguing that recent Court decisions have regularly overridden any presumption against preemption); Calvin Massey, *Federalism and the Rehnquist Court*, 53 Hast. L.J. 431 (2002) (same); Susan Raeker-Jordan, *The Pre-emption Presumption That Never Was: Pre-emption Doctrine Swallows the Rule*, 40 Ariz. L. Rev. 1379 (1998) (same).

[34] *See, e.g.*, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2087 (2000) (arguing that "the constitutional structure

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Legal scholarship abounds with criticism of the "schizophrenic" nature of preemption law.[35] In addition, the courts have been grossly inconsistent when attempting to apply preemption analysis.[36] It is high time to settle this disagreement and give the lower courts and litigants some direction in applying preemption doctrine. Therefore, review is warranted because the states, their indigent citizens, their courts, and the federal courts need clarification on this important issue.

2. Preemption would deny tenants their due process rights under state law and diminish the states' police power.

As discussed *supra*, Tennessee and more than 20 other states adopted the URLTA in order to guarantee the equal rights of tenants and landlords.[37] The structure of the URLTA supports that goal by distributing risks and burdens evenly between the landlord and tenant. Preemption of the state eviction procedures tips the scale in favor

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of federalism does not admit to a general presumption against federal preemption of state law"); *see also Cipollone*, 505 U.S. at 545 (J. Scalia, concurring in part and dissenting in part).

[35] Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. Rev. 559, 560 (1997); *see, e.g.*, Stacy A. Carroll, Note, *Federal Preemption of State Products Liability Claims: Adding Clarity and Respect for State Sovereignty to the Analysis of Federal Preemption Defenses*, 36 Ga. L. Rev. 797, 818 (2002).

[36] *See, e.g.*, *Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 830 (E.D. Tex. 2006) (applying the *Geier* rule only to cases in which implied conflict preemption exists and applying the *Cipollone* "rule" to the implied field preemption analysis); *Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1008 (E.D. Cal. 2002) ("The Supreme Court has described the applicable inquiry in assessing whether a conflict exists between state and federal law in a numbers of manners."); *Sprietsma v. Mercury Marine*, 757 N.E.2d 75 (Ill. 2001) (finding no express preemption provision in Federal Boat Safety Act), *overruled by* 537 U.S. 51 (2002) (finding an express preemption provision in Federal Boat Safety Act).

[37] Tenn. Code Ann. § 66-28-103(b)(3) (2004).

of the landlord, who, if the tenant commits a crime, can later claim that the lease is invalid while having continued to accept rent as if the lease had remained valid. It is the prerogative of the states to establish the balance in landlord-tenant relationships and, as evidenced by the lack of language in federal housing law to the contrary, in eviction procedures. If federal law can disrupt this balance, the state's police power has been irretrievably diminished. Review is warranted because the state and federal courts need guidance on how to apply preemption analysis properly so as to preserve states' powers and tenants' rights.

B. To promote the predictability of housing law, this Honorable Court should clarify that state law eviction procedures are not preempted by federal law.

Preemption of state law can occur in three different situations. First, a federal law can expressly preempt state law.[38] Second, federal law can implicitly preempt state law if federal law so pervasively occupies a field that the introduction of state law into that field would inevitably interfere with federal law's effectiveness in that field.[39] Third, federal law can implicitly preempt state law if the state law actually conflicts with the federal law.[40] Even then, preemption extends only insofar as the conflicting laws cannot be construed harmoniously.[41]

This case involves neither express nor field preemption.[42] Congress did not state anywhere in the Act that it or the HUD regulations should preempt state law. In fact, the

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[38] *Jones v. Ruth Packing Co.*, 430 U.S. 519, 525 (1977).

[39] *Patapsco Guano Co. v. North Carolina*, 171 U.S. 345, 358 (1898).

[40] *Pac. Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983).

[41] *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 182-83 (1978).

[42] The parties agreed to this at the state level. *Ross v. Broadway Towers, Inc.*, 228 S.W.3d 113, 122 (Tenn. Ct. App. 2006).

regulations – which have not been overruled by Congress – specifically provide that the federal law is to work in concert with the state laws.[43] Further, field preemption is not present because federal housing law constitutes only a small portion of the laws governing the landlord-tenant relationship.

The issue in this case, then, is whether the state law sufficiently conflicts with the federal law to warrant a finding of conflict preemption. First, in areas of traditional state regulation such as landlord-tenant law, there is a presumption against federal preemption.[44]

Second, section 66-28-508 and similar laws in other states do not conflict with the federal housing law because the federal law expressly relies upon state law to supply the eviction procedures, even when federal housing law governs other aspects of the landlord-tenant relationship. The structure of the federal law and regulations at issue make this point particularly obvious. The federal statute at issue, 42 U.S.C. § 1437d(l)(6), and the accompanying regulations all proceed from the assumption that the actual eviction of tenants will be accomplished in state court under state law. We know this is so because neither Congress nor HUD has created a separate or different federal eviction procedure. Moreover, the federal statutes and regulations at issue here only require the inclusion of a provision in the lease itself; they say nothing to suggest that the inclusion of this lease provision should wipe out some or all state law tenant protections.[45]

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[43] *See* 24 C.F.R. § 247.6(c) (2006).

[44] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[45] One of the HUD publications announcing the "one strike and you're out" lease provisions also makes the continuing viability of state eviction procedures clear. HUD states that "[i]n 47 states HUD has determined that the state landlord-tenant process provides the necessary pre-eviction hearing and other basic elements of due process, so that PHAs can exclude criminal activity evictions from their grievance procedures and proceed entirely through the state court system." HUD Directive Number 96-16, *available at* http://www.hudclips.org/sub_nonhud/html/nph-brs.cgi?d=PIHN&s1=96-$%5Bno%5D&op1=AND&

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It is also worth noting that when HUD wants to preempt state law, it does not hesitate to do so. HUD regulations explicitly preempt state and local rent control laws[46] and any state laws that impose jurisdictional limitations contrary to the Section 8 voucher program.[47]

Finally, even if section 66-28-508 and the similar laws did warrant application of conflict preemption analysis, well-established preemption law favors reconciling the statutes to the greatest extent possible so they may work together harmoniously, rather than nullifying one rule in its entirety. In this case, reconciliation is quite simple: Federal law requires the inclusion of certain lease provisions, but state law governs eviction proceedings if those lease provisions are violated.

1. In areas traditionally regulated by the states, there is a presumption against preemption.

There is a presumption against federal preemption of state laws in areas traditionally regulated by the states.[48] To overcome this presumption, Congress must have intended the federal law to preempt state law in the state-regulated areas.[49] Thus, "the purpose of Congress is the ultimate touchstone" of the inquiry into whether federal

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SECT1=TXTHLB&SECT5=PIHN&u=/html/shortcut.htm&p=1&r=78&f=G. This same directive goes on to note that any procedural defenses that are not preempted may be utilized by tenants in state eviction proceedings. *See id.*

[46] *See* 24 C.F.R. § 850.153 (2006) (preempting state and local rent control laws under Housing Development Grant Program).

[47] *See* 24 C.F.R. § 982.354(b) (2006) (preempting any state law imposing limitation on jurisdiction of local housing authority when voucher holder moves to another area under portability provision of Section 8).

[48] *Id.*

[49] *Id.*

law preempts state law.[50] Congressional intent may be demonstrated by explicit language in the federal law or by the law's "structure and purpose."[51]

This case involves landlord-tenant law, which is an area traditionally regulated by states even when HUD provides for funding.[52] Therefore, the presumption against preemption applies. The presumption can only be rebutted with evidence of Congress's intent that state law should be preempted; as discussed *supra*, Congress's clear intent was for the federal housing regulations to work alongside state landlord-tenant law.[53] Furthermore, the structure and purpose of the Act indicate that Congress intended to legislate only with respect to funding and management of public housing projects, not to interfere with state housing courts' jurisdiction or proceedings. Therefore, because neither the federal statutes nor the enacting regulations in any way reflect a congressional intent to preempt state landlord-tenant law, the presumption against preemption in areas traditionally regulated by the states dictates that Tennessee Code Annotated section 66-28-508 must not be preempted.

2. State waiver laws do not conflict with the relevant federal housing regulations because both laws can, and therefore must, be construed harmoniously according to established preemption law.

The precepts of federalism require that the courts preserve and uphold state law wherever possible, deferring

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[50] *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (alterations omitted).

[51] *Jones v. Ruth Packing Co.*, 430 U.S. 519, 525 (1977).

[52] *See Pennell v. City of San Jose*, 485 U.S. 1, 12 (1988); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Independence Park Apartments v. United States*, 449 F.3d 1235, 1243 (Fed. Cir. 2006).

[53] *See* 24 C.F.R. § 247.6(c) (2006).

to federal law only in cases of clear preemption.[54] "Because the States are independent sovereigns in our federal system, [this Court has] long presumed that Congress does not cavalierly pre-empt" state laws.[55] Conflict preemption analysis demands that courts first attempt to harmonize state and federal laws.[56] Courts should only find preemption where a private party would be unable to comply with both laws or where the Congress has made "a clear and unambiguous statement of intent to preempt" the state law.[57] In addition, "[w]here coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one."[58] Under a properly applied preemption analysis, then, federal laws that dictate when landlords should initiate eviction proceedings do not override state laws defining the defenses available to tenants in such proceedings.

This Court has long held that state laws, especially in areas traditionally occupied by the states, are "not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."[59] Even if a potential conflict exists, the Court has traditionally favored a narrow interpretation of the federal statute's reach[60] rather than a reading that would merely favor a broad statutory purpose.[61]

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[54] *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996); *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 450 (2005).

[55] *Medtronic, Inc.*, 518 U.S. at 485.

[56] *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 182-83 (1978).

[57] Carroll, *supra* note 35, at 821-22.

[58] *N.Y. State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973).

[59] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *accord Medtronic, Inc.*, 518 U.S. at 485; *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

[60] *Ray*, 435 U.S. at 182-83.

[61] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986).

In fact, the Court has used conflict preemption analysis specifically to ensure "that *both* state and federal regulatory schemes may operate with some degree of harmony."[62] Proper preemption analysis requires that the courts integrate federal and state laws in such a way as to avoid conflict preemption wherever possible. "[T]he [C]ourt has recognized the practical importance of preserving local independence, . . . *i.e.*, by applying pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute's language and purpose with federalism's need to preserve state autonomy."[63] When analyzing laws or regulations for a potential conflict, the courts must begin with the assumption that no true conflict exists and attempt to preserve as much as possible of both the state and federal schemes.

In *Pacific Gas & Electric Co.*, the Court noted the standard for evaluating implied conflict preemption:

> [W]here Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it *actually conflicts* with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[64]

Congress's intent may be discerned not only from the language of the statute but also from the structure of the

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[62] *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 516 n.12 (1989).

[63] *Egelhoff v. Egelhoff*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting).

[64] *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (quoting *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. at 142-43; *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (emphasis added).

statute and the overarching statutory scheme.[65] In the case of federal housing, this leads to a finding that federal laws imposing requirements on landlords do not preempt state laws offering defenses to tenants.

The Act focuses on funding, insurance, costs, and facility design and management of public housing,[66] while the related statute 42 U.S.C. § 1437d(l)(6) (2000) addresses the "terms and conditions" of public housing leases and their "termination." None of those provisions ever describe the procedures or processes through which evictions should be carried out. In fact, nowhere in federal housing law does Congress establish any procedure for eviction. If Congress had intended to upend or eradicate state eviction procedures, it certainly could have provided its own eviction procedures in their place. It is clear from the structure of the federal statutes that Congress intended the state law to continue to provide the eviction procedures.

The enacting HUD regulations further indicate their reliance on state eviction procedures: "The landlord shall not evict any tenant except by judicial action pursuant to State or local law and in accordance with the requirements of this subpart."[67] Finally, the regulations explicitly provide that "[a] tenant may rely on State or local law governing eviction procedures where such law provides the tenant procedural rights which are in addition to those provided by this subpart. . . ."[68] Clearly, HUD contemplated how the state and federal law would interact in this context, and its description and expression of congressional intent – which Congress has not countermanded – plainly show that the HUD regulations are not intended to preempt the rights tenants have under state law.

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[65] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373-73 (2000).

[66] *See* discussion *supra* Part I.C.

[67] 24 C.F.R. § 247.6(a) (2006).

[68] § 247.6(c).

Furthermore, the laws do not impose conflicting obligations on any party so as to make compliance a "physical impossibility."[69] It is a well-established principle that a landlord's cause for terminating a tenancy, whether created by statute or by the terms of the lease, is not incompatible with a tenant's affirmative defenses to such termination.[70] Those defenses do not impose any duty on the landlord, much less one that would prevent him from complying with the federal regulations.

Finally, the state laws do not prevent the federal laws from serving their intended purpose. In fact, "[h]ousing is an area where Congress intended . . . two complementary systems of regulations to *supplement each other*, with local law providing the general background law and federal law intervening only where federal involvement is deemed necessary."[71] Congress has explicitly and repeatedly relied upon state and local law to preserve tenants' due process rights since it created federally assisted public housing in 1934.[72] If Congress had intended to reverse this policy and

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[69] *Pac. Gas & Elec. Co.*, 461 U.S. at 204 (quoting *Fla. Lime*, 373 U.S. at 142-43).

[70] *See, e.g., Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268, 284 (1969) (dictum) ("[W]e have no reason to believe that once petitioner is told the reasons for her eviction she cannot effectively challenge their legal sufficiency in whatever eviction proceedings may be brought in the North Carolina courts."); Restatement (Second) of Property: Landlord & Tenant §§ 5.4-5.5 (1977) (stating that landlord's failure to maintain property in habitable condition justifies tenant in withholding rent and citing, in reporter's notes, cases that refer to this as a defense to eviction for nonpayment of rent).

[71] *Rowe v. Pierce*, 622 F. Supp. 1030, 1033 (D.D.C. 1985) (emphasis added).

[72] National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (codified as amended at 12 U.S.C. § 1701 et seq.) (recognizing state jurisdiction over public housing projects and preserving tenants' civil rights under state and local law); *U.S. Dep't of Housing & Urban Dev. v. Rucker*, Br. for Amici Curiae AARP et al., Nos. 00-1770, 00-1781, 2001 WL 1820807, at *14-15 (U.S. Dec. 20, 2001) (discussing Congress's intervention in 1988 when HUD proposed eliminating tenants' "affirmative legal or

(Continued on following page)

destroy a key element of state housing law, it surely would have done so explicitly. To strip all defenses – and only the defenses – from state law eviction proceedings, especially with neither express congressional nor regulatory language as support, would throw off the entire balance of the state scheme as well as the very notion of federalism.

Instead, federal and state housing laws continue to coexist within the procedural frameworks established by the states. The federal statutes and regulations are written precisely to intrude in only a few circumscribed areas of housing law while leaving much of the procedural and substantive law to the states.[73] The states, meanwhile, provide a fully developed eviction procedure, of which the tenant's affirmative defenses are part and parcel. The federal and state laws at issue here are easily reconciled with each other, so preemption should not apply and the state statutes should be given full force.

III. CONCLUSION

For the reasons set forth above, this Honorable Court must grant certiorari to Petitioners so it may resolve a crucial question of preemption and federalism and provide guidance to the lower courts, the state courts, and the representatives of the indigent elderly.

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equitable defense[s]" under state law in cases of eviction for drug-related criminal activity).

[73] *See* discussion *supra* Part I.C.

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